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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1310

EDWARDS UNDERGROUND WATER DISTRICT; BEXAR COUNTY, TEXAS; CITIZENS FOR A BETTER ENVIRONMENT; AND LEAGUE OF WOMEN VOTERS,

Petitioners,

vs.

JAMES T. LYNN, SECRETARY OF THE U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; AND SAN ANTONIO RANCH, LTD.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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"In their pell-mell drive to build and finance costly projects, Federal officials . . . are long on environmental rhetoric, but short on environmental action . . . . They seek to subvert NEPA by complying in form but not in substance. They have yet to develop a discernible environmental conscience."

Congressman John D. Dingell, Co-Author,
National Environmental Policy Act, Press
Release, December 4, 1972

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

EDWARDS UNDERGROUND WATER DISTRICT; BEXAR COUNTY, TEXAS; CITIZENS FOR A BETTER ENVIRONMENT; AND LEAGUE OF WOMEN VOTERS,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above action entered on October 4, 1974, affirming in part and reversing in part the judgment of the United States District Court for the Western District of Texas.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 502 F.2d 32. It is attached as Appendix A to this Petition at page A1. The order of

the United States Court of Appeals denying the Petition for Rehearing En Banc is attached as Appendix B at page A47. The opinion of the United States District Court for the Western District of Texas is reported at 364 F. Supp. 834 and is attached as Appendix C at page A48.

By Order entered February 5, 1975, the time for filing a Petition for Writ of Certiorari in this cause was extended by Mr. Justice Powell up to and including April 18, 1975.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 4, 1974, and a timely Petition for Rehearing En Banc was denied on November 19, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether HUD's consideration of alternatives in its environmental impact statement, and in particular its failure to consider alternative sites, violates the National Environmental Policy Act (NEPA).

2. Whether HUD's abdication of its impact statement responsibilities to the financially interested Developer violates NEPA. The Fifth Circuit's decision on this point is in direct conflict with the decision in *Greene County Planning Board* v. *FPC*, 455 F.2d 412 (2d Cir. 1972).

3. Whether HUD violated NEPA by failing to consider in its impact statement the secondary impacts of the 40,000-person parasite developments which will be attracted by the HUD-subsidized Development.

4. Whether HUD violated NEPA and its own Regulations by making the decision to give financial assistance to the Developer before the environmental studies and the final impact statement were prepared.

5. Whether HUD's decision to give financial assistance to the Developer is in compliance with the mandates of the Urban Growth and New Community Development Act of 1970. This is the first appellate decision interpreting that Act.

STATUTES AND REGULATIONS INVOLVED

The statutes, regulations and agency directives involved are set out in the Appendix which is being filed concurrently with this Petition under separate cover. The citations to these statutes, regulations and directives are as follows:

National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*

Urban Growth And New Community Development Act of 1970, 42 U.S.C. § 4501 *et seq.*

Council on Environmental Quality, Statement on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. No. 79 (April 23, 1971)

Council on Environmental Quality, Memorandum For Agency And General Counsel Liaison on NEPA Matters (May 16, 1972)

Council on Environmental Quality, Guidelines For Preparation of Environmental Impact Statements, 40 C.F.R. § 1500 (1973)

Department of Housing and Urban Development, Departmental Policies, Responsibilities and Procedures for Protection And Enhancement of Environmental Quality

Department of Housing and Urban Development, Regulations on Urban Growth And New Community Development Act of 1970, 24 C.F.R. § 32 (36 Fed. Reg. 14205-14 (July 31, 1971))

Department of Housing and Urban Development, Circular on Areawide Planning Requirements, Circular MPD 6415.1A, 12-14 (July 31, 1970)

STATEMENT OF THE CASE

Petitioners are two governmental agencies of the State of Texas, and two citizens' groups, who, by this action, seek to prevent HUD from guaranteeing 18 million dollars in bonds for a proposed 88,000-person new community to be located directly on top of the prime Recharge Zone to San Antonio's natural underground water supply. Petitioners maintain that HUD may not guarantee these bonds because its environmental impact statement (EIS) is procedurally and substantively deficient and also because the Developer's proposed new community is ineligible for assistance under the Urban Growth and New Community Development Act of 1970.

The opinion of the Fifth Circuit contains a detailed discussion of the facts involved in this case; however, many of the facts set out in the Court's opinion do not draw their essence from the record, while other pertinent facts are omitted. Petitioners, therefore, have set forth below a short summary of the material facts.

A. Chronology of the Proceedings Below

This case began for all practical purposes in September of 1971, when HUD circulated its draft EIS for the proposed San Antonio Ranch Development ("Development"). The developer of this proposed project, San Antonio Ranch, Ltd. ("Developer"), is a land speculation syndicate which was seeking federal assistance under the Urban Growth and New Community Development Act in the form of an 18 million dollar bond guarantee to finance construction of the new 88,000-person city twenty miles northwest of San Antonio.

On October 12, 1971, during the comment period for the draft EIS, the Board of Directors of HUD's Community Development Corporation, chaired by George Romney, voted to authorize an offer of commitment at the earliest appropriate time to the Developer (Developer's Brief to the Fifth Circuit Exh. 41). At this point in time, neither HUD nor the Developer had made any environmental studies of the project.

On January 23, 1972, HUD's first Final EIS was distributed (IR No. 4),[1] and on February 23, 1972, a commitment was issued to the Developer. On that same day, the Sierra Club and three other citizens groups filed suit in federal court alleging violations of NEPA and the New Community Act.

At TRO hearings held in February and March of 1972, HUD and the Developer asked the Trial Court to

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1. References to the five volumes of Record on appeal will be designated "R". IR Number 4, for example, refers to document No. 4 in Volume No. I of the Record. References to the testimony in the Trial Court will be indicated by "Tr", and the trial exhibits of Petitioners, HUD and San Antonio Ranch, Limited, will be indicated, respectively, by the symbols "PX," "GX" and "DX".

hold the entire case in abeyance for an indefinite period of months while the Developer (not HUD) ran the studies that HUD should have conducted before the January 23 EIS was issued (VR Nos. 171, 172). The Trial Court agreed that HUD's EIS was totally inadequate (VR No. 172, pp. 2-4, 11-12, 16), and postponed a trial on the merits until further studies could be conducted:

> "It seems to me that they [HUD] just jumped the gun. They had a case against Romney that the lawyers up there should have read. . . ." [VR No. 172, p. 3]
>
> ". . . [I]t seems to me that if this law means what it appears to mean, that when they filed this so-called final statement, it was just ridiculous; it was not a final statement and should not have been termed a final statement, and that when they make this offer of a commitment, they are jumping the gun, that they are trying to get the cart before the horse." [*Id.* p. 4]
>
> "They called it a final statement, but it obviously is not." [*Id.* p. 11]
>
> "I think he [HUD Counsel] could have withheld the offer of commitment until he was in a position to do it."
>
> ". . . HUD must do the advising and HUD must come to its own conclusions, and HUD can't let the developer do it. I know the cases say that. So it seems to me that he [HUD administrator] knew when he did it that he was engaging in some kind of—I won't call it hanky panky, although it could be subject to that criticism—that simply he was engaging in something, in something not contemplated by the law, because he knew it at the time he did it." [*Id.* p. 12]

> "We are talking about a compromise situation [Defendants' requested abeyance of proceedings] that I characterize . . . as a confession of error." [*Id.* p. 16]

After the continuance was granted, the Developer's two principal paid consultants began their studies. HUD did not hire its one consultant, Dr. Beck, until April 25, 1972 (Tr 1448)—over three months after HUD had issued its first Final EIS and over two months after the 18 million dollar commitment had been extended to the Developer.

A committee entitled the San Antonio Ranch Water Quality Review Board was also set up to evaluate the project and determine whether it was an environmentally sound endeavor (HUD's Brief to the Fifth Circuit at page 9). Although this committee was chaired by Mr. Hugh Yantis, head of the Texas Water Quality Board, the transcripts from its four meetings show that it was dominated by the Developer's public relations personnel and that its sole function was to justify the project.[2]

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2. This "Review Board" did nothing other than hold meetings on April 24, 1972, May 11, 1972, June 8, 1972, and June 23, 1972 and talk (DX-C-3 Exh. 3). It had no continuing duties, and its work, if it can be called that, can be measured more nearly in hours than days. Further the tone of these meetings more nearly resembled that of a public relations' seminar than a work group. The program was opened by the Developer's chief PR man Bob Honts (DX-C-3 Exh. 3, April 24th Tr p. 1). Mr. Honts: ". . . [W]e'll . . . try to initiate the activities for the day." Honts then introduced all of the San Antonio Ranch people who had turned out in force for the meeting and finally turned the meeting over to Yantis, head of TWQB. Yantis then described what the group would do: "[I]t is a review board of public agencies only, government agencies, there are not any—*there's no place here for the ordinary citizen or the ordinary association.*" (DX-C-3 Exh. 3, April 24th Tr p. 3 [emphasis added]). Yantis also mentioned who had prepared the program, and, of course, it was not HUD: "Before I go down the agenda here, as was prepared by the San Antonio Ranch people. . . ." (DX-C-3 Exh. 3, April 24th Tr p. 9). Finally he told the group of the

(Continued on following page)

On August 19, 1972, Dr. Beck submitted his report to HUD (Tr 1463). This report consists essentially of an analysis of the studies made by the Developer's paid consultants and reflects virtually no independent research by Dr. Beck, who testified that he "was requested to review the site, the studies which were made, and draw [his] conclusions from that" (Tr 1485).

Footnote Continued—

weight that would be given their efforts: "The committee in fact has no authority. None whatever." (DX-C-3 Exh. 3, April 24th Tr p. 34).

Yantis, who had been giving his full-fledged support to the project for the two years prior to this meeting (DX-C-3 Exh. 11), also told the group what results he wanted them to reach: "The thought is this—it would be utterly ridiculous for my agency, with me sitting here as chairman, to go all the way through this thing and then when we got through issue some pronouncement like saying, it ought not to be done or can't be successful" (DX-C-3 Exh. 3, June 8th Tr p. 63). Yantis continuously referred to the Developer's PR man Bon Honts as the "host" throughout the meetings and periodically would turn the leadership of the meeting over to Honts. This can be found throughout the Transcript of the meetings: "Bob Honts will act as our host here for a moment and go through the comments that have been received from various agencies" (DX-C-3 Exh. 3, June 8th Tr p. 46). Or on page 2 of the June 23rd meeting "our host, Mr. Bob Honts, just walked off." Or page 104 of the June 23rd meeting "Excuse me, just one minute. Will you [referring to Honts] act as chairman until I get back?"

Where was HUD during all this procedure? The Transcript shows that HUD had a man attending the sessions, but the most accurate answer was perhaps given by Chairman Yantis in response to a question from one Lewis Seward: "Does HUD agree with all this—is this the way they want it?" Yantis: "I don't care whether they want it that way or not—I'm telling you what I want . . . ." [(DX-C-3 Exh. 3, June 8th Tr p. 63)].

HUD and the Developer labeled these meetings as "public hearings," but Chairman Yantis even has a word to say there: "And I used the word public hearing awhile ago—I meant a hearing in public—which is not quite the same thing" (DX-C-3 Exh. 3, June 8th Tr p. 60). With the leadership and the host as is indicated above, it is not surprising that the principal thrust of the meetings was that the San Antonio Ranch would be a utopian community.

On August 24, 1972, only five days after Dr. Beck's report was finished, HUD issued its second Final EIS, or "Addendum" as HUD tactfully put it, which was many times longer than the first Final EIS it was designed to supplement (DX-C-1, C-2, C-3).

Like the first Final EIS of January 23, 1972, the August 24 EIS is conclusory and shallow and is replete with superficial statements which indicate that this was a "justification" statement made to justify HUD's outstanding commitment to the Developer rather than an impact statement designed to assist HUD in deciding whether to make a commitment at all and to expose HUD's decisional processes to scrutiny by outsiders. In fact, much of the second Final EIS was lifted word-for-word from Dr. Turk's reports—the Developer's paid consultant (Tr 1620).

On April 30, 1973, the case proceeded to trial. The original plaintiff citizens groups had previously been joined by Bexar County and the Edwards Underground Water District, the two principal governmental entities affected by the proposed project. The Developer's attorneys ran the defense, and HUD played a minor role during the trial.

With the sole exception of awarding $20,000 in attorney's fees to the four citizen group plaintiffs and retaining jurisdiction over the project, the Trial Court resolved all issues against Petitioners, holding that HUD's EIS's were neither procedurally nor substantively deficient under NEPA, and that HUD's commitment to the Developer was not invalid under NEPA or the New Community Act. Further, over Petitioners' objection, the burden of proof was placed upon Petitioners.

The case was then appealed to the United States Court of Appeals for the Fifth Circuit, which on October 4, 1974,

affirmed the Trial Court's NEPA and New Community Act findings and reversed the award of attorney's fees and the Trial Court's retention of jurisdiction.

B. The Physical Characteristics of the Edwards Aquifer and the Proposed Development

San Antonio and surrounding communities receive all of their water from a natural underground water storage area known as the Edwards Underground Reservoir or the Edwards Aquifer ("Aquifer"). This Aquifer has a capacity of about fourteen million acre feet and is roughly half the size of Lake Mead, which is the largest man-made reservoir in the United States. It is presently one of the purest water supplies in the world (Tr 100, 125), and the water yielded by the Aquifer is of such excellent quality that it does not have to be treated, only chlorinated as a precautionary measure (Tr 229).

Water reaches the Aquifer through an area of outcropped heavily fractured limestone known as the Recharge Zone, which forms a small part of the multi-county Aquifer and ranges in size from one-half to several miles in width (Tr 30-35, 109). The Aquifer is recharged by water entering the billions of faults, joints, fractures and solution cavities which surface everywhere on the Recharge Zone (Tr 30-35). The water that recharges the Aquifer comes primarily from four sources: rivers flowing across the Recharge Zone, stormwater runoff, seepage from lakes, and direct penetration from rainfall (Tr 30-42). If any of this water becomes polluted, the Aquifer likewise becomes polluted.

Eight thousand of the proposed Development's 9,300 acres lie directly astride this sensitive Recharge Zone in Bexar County (Tr 31, 401), and approximately one per-

cent of the total annual recharge to the Aquifer comes from this site (Tr 69). The Development site contributes about 5,000 acre feet of recharge each year to the Aquifer (Tr 100-01), which if polluted would mean that annually over 1.6 billion gallons of polluted water would flow into the Aquifer from the Developer's stormwater runoff (Tr 102). The proposed Development's 8,000 acres of Recharge Zone are shattered with millions or billions of fractures and joints that are potential sources of recharge and pollution (Tr 327). The Developer's blasting of roads, housing sites and underground sewers will increase the fracturing, and the recharge, on this site (Tr 385, 1087).

In addition, the 88,000-person Development will boost development over the Recharge Zone from the present 2 1/2% of scattered low density habitation to 15% (Tr 568). According to HUD's second Final EIS, the Development will generate adjacent parasite developments (not subject to HUD's controls) housing as many as 40,000 additional people (Tr 696; DX-C-2, Exh. 3, p. 41), thereby boosting development over the Recharge Zone by an additional 5% (Tr 570). Thus, the proposed Development will increase development over the sensitive Recharge Zone from the current 2-1/2% to 20% (Tr 570).

The Development itself will pollute the Aquifer in at least four ways:

(1) Through leakage from the Development's approximately 1,000 miles of sewer lines (Tr 165-76, 187-97, 226). These lines will have a maximum permissible leakage rate of 200 gallons per inch diameter per mile per day (Tr 160-61), which means that under HUD's controls, the

Development can lawfully leak a whopping 1,600,000 gallons of sewage per day into the Aquifer (Tr 186, 227, 282).[3]

(2) From stormwater runoff (Tr 139, 280, 404, 525-26), which contains viruses, bacteria, grease, pesticides, fertilizers, lead and other harmful substances (Tr 139, 206).

(3) Percolation through lawns, golf courses and other soil areas that are treated with fertilizers, herbicides and insecticides (Tr 211-15).

(4) Seepage from the two major and six minor lakes the Developer intends to build (Tr 993, 1473; DX-C-1, p. 70).

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3. The development site contributes approximately 1% (5,000 acre feet) of recharge annually to the Aquifer. This 5,000 acre foot figure, however, comprises only recharge generated by rainfall and does not include the 1,600,000 gallons of raw sewage which the project's sewer system can lawfully leak each day (Tr 526). On an annual basis, the Development's sewer system can leak 584,000,000 gallons of sewage, which is approximately 1800 acre feet, or slightly more than 1/3 of the recharge coming from rainfall. It should be kept in mind that the 5,000 acre foot figure is only an average, and in dry years this figure would be much lower, with the lowest on record being 400 acre feet (Tr 53). Thus in dry years, recharge coming from leaking sewers on the project site would pose an even greater pollution hazard.

REASONS FOR GRANTING THE WRIT

I

THE FIFTH CIRCUIT'S FINDING THAT HUD'S IMPACT STATEMENT SATISFIES THE REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS

Since NEPA was enacted in 1969, this Honorable Court has not written an opinion concerning the impact statement requirements that NEPA imposes on the federal agencies. The instant decision of the Fifth Circuit delves into a variety of NEPA issues—both procedural and substantive—and departs from the rigid standards imposed by the other Circuit Courts in NEPA cases. Petitioners respectfully submit that this Honorable Court should resolve the conflicts created by the Fifth Circuit and issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

A. HUD's Treatment of Alternatives Is Inadequate

Every Circuit Court to consider the adequacy of an EIS has held that the most important part of an impact statement is a thorough discussion "to the fullest extent possible" of alternative courses of action.[4] As stated in

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4. The requirement that federal agencies consider alternatives in their impact statements is found in sections 102(2)(C)(iii) & (D) of NEPA (42 U.S.C. §§ 4332(2)(C)(iii) & (D)), which provide as follows:

"... [A]ll agencies of the Federal Government shall—

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly

(Continued on following page)

Monroe County Conservation Council, Inc. v. *Volpe*,[5] "[t]he requirement for a thorough study and a detailed description of alternatives, . . . is the linchpin of the entire impact statement."[6]

The Fifth Circuit's decision in the instant case, although extolling the strict burden which NEPA imposes on federal agencies to treat alternatives "to the fullest extent possible," has sanctioned HUD's failure to consider the single most important alternative available—location

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Footnote Continued—

> affecting the quality of the human environment, a detailed statement by the responsible official on—
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> * * *
>
> (iii) alternatives to the proposed action,
>
> * * *
>
> (D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources; . . ."

5. 472 F.2d 693 (2d Cir. 1972).

6. *Id.* at 697-698. *See also Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971):

> "This requirement [the study, development and description of alternatives], like the 'detailed statement' requirement, seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance.
>
> "Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made. Moreover, by compelling a formal 'detailed statement' and a description of alternatives, NEPA provides evidence that the mandated decision making process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own. [*Id.* at 1114]
>
> "NEPA requires that an agency must—to the *fullest* extent possible under its other statutory obligations—consider alternatives to its actions which would reduce environmental damage. That principle establishes that a consideration of environmental matters must be more than a *pro forma* ritual." [*Id.* at 1128.]

of the proposed development on a site off the sensitive Recharge Zone. Since virtually all of the adverse environmental impacts associated with this project stem solely from selection by the Developer of a site on an environmentally sensitive area, it should be axiomatic that HUD be required to "study, develop and describe" alternative sites. By condoning HUD's failure to consider this important alternative, the Circuit Court has deviated from the rigorous rules followed by the other Circuit Courts on this subject[7] and has established a rule for the Fifth Circuit that something less than compliance "to the fullest extent possible" is acceptable. Petitioners submit that the course charted by the Fifth Circuit seriously undermines the continued efficacy of NEPA in preventing environmentally unsound decisions. (So that this Court can fully comprehend the inadequacies in HUD's discussion of alternatives, the "alternatives" sections of HUD's two final EIS's are attached as Appendices D and E at pages A90 and A92.)[8]

The basis for the Circuit Court's ruling on the alternative site issue is not clearly articulated. It would appear, however, that the crux of the Court's decision is found in its statement that "[a]bsent a competing applicant, HUD's prerogatives ultimately consisted of accept-

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7. *See, e.g., EDF* v. *Froehlke*, 473 F.2d 346 (8th Cir. 1972); *Monroe County Conservation Council, Inc.* v. *Volpe*, 472 F.2d 693 (2d Cir. 1972); *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827 (D.C. Cir. 1972); *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

8. Besides failing to consider alternative sites, HUD's EIS erroneously ignored virtually all other alternatives, such as governmental acquisition of the Recharge Zone, modification of federal assistance programs to discourage development over the Recharge Zone, development of more stringent land-use controls, development of a different type of new town, and the use of alternative designs. These points are fully briefed at pages 61 through 65 of Petitioners' brief to the Fifth Circuit.

ing or rejecting the application before it."[9] In other words, since HUD is authorized only to accept or reject applications for new community assistance (a faulty premise as shown below), HUD is under no obligation to consider alternative sites at all.

Petitioners submit that the Circuit Court has misconstrued the applicable statutes involved. First, assuming that HUD is authorized only to reject or accept applications, NEPA nevertheless requires HUD to consider all available alternatives in evaluating an application, including alternatives which are outside its jurisdiction or control and which it cannot implement.[10] This was recognized by the Circuit Court in its opinion.[11] Thus, even if HUD were powerless to implement construction on an alternative site, this is no excuse for HUD's failure to consider alternative sites in its EIS. To permit HUD to evade this responsibility on the mere ground that HUD can only accept or reject applications is comparable to permitting the AEC to license a nuclear power plant on top of an earthquake fault without considering other sites that would be safer merely because the power plant applicant owned no other location.[12]

Further, since HUD represents the public interest, it would have an affirmative obligation to consider alterna-

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9. 502 F.2d at 62 [App. A at p. A37].

10. *Accord, Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827, 837-838 (D.C. Cir. 1972).

11. 502 F.2d at 61 [App. A at p. A36].

12. In this regard, it is interesting to note that the AEC does consider alternative sites in deciding whether to license a proposed nuclear power plant. Unlike HUD, the AEC has no authority to build its own projects, but sits only to grant or deny licenses. The AEC, however, treats alternative sites as a necessary part of the no-action alternative in its EIS's. *AEC, Guide to the Preparation of Environmental Reports for Nuclear Power Plants* § 9.2 at 30.

tive sites in deciding whether to accept or reject an application for new community assistance even if NEPA did not exist. For example, in *Scenic Hudson Preservation Conference* v. *FPC*,[13] a pre-NEPA case, the FPC argued among other things that in deciding whether to license a proposed power plant, it was not obligated to scrutinize alternative sites. The Second Circuit rejected this position:

> "In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.
>
> "In viewing the public interest the Commission's vision is not to be limited to the horizons of the private parties to the proceedings."[14]

On remand from the Second Circuit, the FPC considered all conceivable sites for the power plant within a 100-mile radius of New York City. *Scenic Hudson Preservation Conference* v. *FPC*.[15]

Like the FPC in the *Scenic Hudson* case, HUD has an affirmative obligation on its own initiative to seek out and

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13. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

14. *Id.* at 620, 621. *See also City of Pittsburgh* v. *FPC*, 237 F.2d 741 (D.C. Cir. 1956):

> "The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the [original] proposal." [*Id.* at 751 n.28].

15. 453 F.2d 463, 472 (2d Cir. 1971).

consider all alternatives, including alternative sites,[16] and the mere fact that HUD possesses statutory authority to assist new community projects does not in and of itself justify the construction of an improvidently situated new town. *See Udall* v. *FPC*.[17]

Moreover, contrary to the Circuit Court's basic premise, HUD's authority is *not* limited solely to accepting or rejecting applications for assistance. Section 723 of the New Community Act[18] specifically authorizes the Secre-

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16. In the *Scenic Hudson* case, the Court found this obligation to exist even though NEPA had not been passed at that time, and the Court's reasoning emphasized the FPC's role as guardian of the public interest. In exercising its responsibilities under the New Community Act, HUD is also acting as a guardian of the public interest through the preservation and enhancement of man's living environment. For example, section 702(a) of the New Community Act (42 U.S.C. § 4502(a)), which sets out Congress' findings and declaration of policy, states that "the rapid growth of urban population and uneven expansion of urban development . . . has created an imbalance between the Nation's needs and resources and seriously *threatens our physical environment*, and that the economic and social development of the Nation, the proper *conservation of our natural resources*, and the achievement of satisfactory living standards depend upon the sound, orderly and more balanced development of all areas of the Nation [emphasis added]." Similarly, section 710(b) of the Act (42 U.S.C. § 4511(b)) provides that the "continuation of established patterns of urban development . . . will result in (1) inefficient and wasteful use of land resources which are of national economic and environmental importance; (2) destruction of irreplaceable natural and recreational resources and increasing pollution of air and water; . . ." Section 712(a)(1) of the Act (42 U.S.C. § 4513(a)(1)) lists as one of the eligibility requirements for new community assistance that the program will help "preserve or enhance desirable aspects of the natural and urban environment. . . ." Petitioners submit that even if NEPA did not exist, HUD would be obligated under the New Community Act, and its role as guardian of the public interest, to examine alternative sites in passing on an application for new community assistance.

17. 387 U.S. 428, 449 (1967) ("The issues of whether deferral of construction would be more in the public interest than immediate construction and whether preservation of the reaches of the rivers would be more desirable . . . are largely unexplored in this record. We cannot assume that the Act commands the immediate construction of as many projects as possible.")

18. 42 U.S.C. § 4524.

tary of HUD to "plan and carry out large-scale projects demonstrating the development of new communities, which shall be designed to contribute to the achievement of the purposes of this part and serve as models for new community developments which could feasibly be carried out by other public and private developers." In view of this provision, an alternative available to HUD that *was* within its power to implement, was the development of its own new community in Bexar County, Texas, off the Recharge Zone.[19]

The Circuit Court rejected this argument because "this statutory authority does not obligate the agency to search out a competing applicant . . . or to work up a counterproposal of its own."[20] The Court's statement misses the thrust of Petitioners' argument. Petitioners do not maintain that section 723 in and of itself compels HUD to prepare its own counterproposal to an application. Rather, Petitioners' point is that section 723 forms the underpin-

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19. In its Brief to the Fifth Circuit, HUD has defended this omission on the ground that section 723 requires Presidential authorization and Congressional funding. HUD's position, however, ignores the ultimate question of who has the responsibility for securing Presidential authorization and Congressional funding. The answer is self evident: HUD has the responsibility. Any other interpretation of section 723 would render that section of the Act a nullity. Contrary to HUD's assertion, the fact that section 723 new communities seemingly must be located on federal lands likewise affords no excuse for HUD's failure to consider this alternative. First, HUD made no effort to determine whether existing federal lands are available in Bexar County for such a project, and HUD therefore, cannot even say whether a new community can be placed on the vast amount of existing federal lands in Bexar County. Secondly, and more importantly, section 723 does not require that such land be *presently* owned by the Government, but merely states that HUD-developed new communities be planned and carried out "under applicable federal law respecting the use of federally owned lands." In providing the funds for such a project, one would expect that Congress would also authorize acquisition of private lands selected by HUD for its new community.

20. 502 F.2d at 62 [App. A at p. A37].

nings for an alternative course of action (*i.e.* HUD's own new community) which under NEPA must be considered by HUD in its EIS. Section 723 merely enables HUD to build its own new community off the Recharge Zone; NEPA requires HUD to consider this alternative in its EIS.

The Circuit Court's decision implies that HUD considered the alternative of locating the project on a site off the Recharge Zone.[21] This statement is inaccurate. Although HUD's second Final EIS does contain a short 3-paragraph, self-serving discussion which rejects the possibility that a new community might be located on an alternative site in Bexar County,[22] HUD's only staff witness and the man in charge of the EIS preparation, unequivocally testified that HUD did not consider alternative sites, meaning of course that the reference to this alternative in the EIS was intended only as a *pro forma* justification for HUD's failure to consider alternative sites.[23]

The Circuit Court states that the alternative site "proposal was discarded because it would produce the same adverse environmental results as no action and would not

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21. 502 F.2d at 61 [App. A at p. A35].

22. Appendix E to Petition at A97-98.

23. Thus, Mr. Anthony DeVito, HUD's witness and employee (Tr 1502), stated unequivocally that HUD did not consider alternative sites:

> ". . . There is an infinite number of assemblages of new community parcels that could be presented to us . . . . *It would be difficult for me to understand even how to start on what I think you are talking about which would be HUD going out to examine alternative locations in new communities* as a result of having this application in hand.
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> * * *
>
> "If I could conceive of a way that that could be done I would agree with you. But *I wouldn't know how to even begin . . . .*" [Tr 1698-1700 (emphasis added)].

satisfy the demand for housing in the northwest quadrant of Bexar County."[24] This statement implies that the Development could not be located on a site off the Recharge Zone in the northwest quadrant of Bexar County which would satisfy the claimed need for housing in that quadrant, but, being off the Recharge Zone, would not pollute San Antonio's water.[25] The second Final EIS itself states, however, that "there is considerable land that can be developed for residential purposes in the northwest quadrant" (DX-C-1, p. 24), and the EIS therefore on its face discloses that there were other sites available which would have satisfied HUD's purposes, but which were not explored by HUD, contrary to NEPA's requirement that this alternative be "studied, developed and described."

The Circuit Court also says that "[n]one of the alternative sites in Bexar County suggested by the plaintiff met all the eligibility requirements of Title VII."[26] Petitioners, however, did not have the burden of showing that these other sites satisfied the requirements of the New Community Act. Rather, the burden was on HUD to explore these sites and others as alternatives to locating

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24. 502 F.2d at 61 [App. A at p. A35].

25. The Court's statement is also based on the erroneous assumption that the only purpose for a new community in Bexar County is to capture the growth in the northwest quadrant. As Section II of this Petition shows, placement of a new community in the northwest quadrant will only aggravate the disorderly growth patterns in Bexar County by further stimulating growth in the northwest, to the detriment of the southern half of the County. In preparing its EIS and in evaluating the Ranchtown proposal, HUD, like the Fifth Circuit, myopically focused solely on the northwest quadrant of Bexar County. In this regard, see *Silva* v. *Lynn*, 482 F.2d 1282, 1286 (1st Cir. 1973) where the Circuit Court condemned a HUD-prepared EIS as being "myopic in the sense of focusing on the project site itself, with no supported judgment as to what will happen in other areas nearby."

26. 502 F.2d at 62 [App. A at p. A37].

the Development on top of the Recharge Zone to San Antonio's water supply.[27] Moreover, the Court's statement is in direct conflict with the vast amount of unrebutted evidence which shows that the locations in south Bexar County would ideally serve the purposes of the New Community Act and that the site selected by the Developer in northwest Bexar County is the worst location in the County, not only environmentally, but also from a social, cultural and economic standpoint (Tr 1720-45).

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27. Section 102 of NEPA imposes two requirements upon federal agencies to consider alternatives. Section 102(2)(C)(iii) (42 U.S.C. § 4332(2)(C)(iii)) requires the EIS to contain a detailed statement on alternatives. Section 102(2)(D)(42 U.S.C. § 4332(2)(D)) requires federal agencies to "study, *develop*, and describe appropriate alternatives . . . [emphasis added]." Unless the second provision is mere surplusage to NEPA, it must impose upon government agencies something in addition to that imposed by the "detailed statement" requirement. Petitioners submit that this part of NEPA not only requires a discussion of alternatives in the EIS, but also requires the federal agency to exercise its own initiative in determining what alternatives exist and then to "study, develop and describe" those alternatives. See in this regard *EDF* v. *Froehlke*, 473 F.2d 346 (8th Cir. 1972):

> ". . . [T]he impact statement should not just list the alternatives to the proposed project but it should also include the results of the Corps' own investigation and evaluation of alternatives so that the reasons for the choice of a course of action are clear." [*Id.* at 350.]

See also Montgomery v. *Ellis*, 364 F. Supp. 517 (N.D. Ala. 1973):

> "Further, it appears from the disposition in the EIS of comments of others that the SCS, having formed its decision to proceed with the project, did not of its own initiative consider any alternatives but has merely disposed of all those suggested by others. It has, thus, relegated the required investigatory process under NEPA to mere paperwork in justification of a project it apparently had already decided to carry out. This is in direct contravention of the requirements of NEPA as expressed in numerous cases." [*Id.* at 528].

B. The Fifth Circuit Condoned HUD's Abdication of Its NEPA Responsibilities to the Financially Interested Developer Contrary to the Second Circuit's Decision in Greene County Planning Board v. FPC

The Circuit Court has found nothing wrong with the direct participation of the financially interested Developer and its paid consultants in preparing virtually all environmental studies that underlie the EIS.[28] Petitioners respectfully submit that the Court's decision in this regard is directly contrary to the decision of the Second Circuit in *Greene County Planning Board* v. *FPC*[29]:

> "The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of PASNY [the applicant] for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and once again to act as an umpire. The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumptions.
>
> "[T]he Commission's interpretation . . . flies in the face of Section 102(2)(C) of NEPA which explicitly requires the agency's *own* detailed statement to 'accompany the proposal through the existing agency review processes.' "[30]

In the instant case, it is undisputed that the Developer's paid consultants prepared all but one of the environmental studies on which HUD's EIS was based and that

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28. 502 F.2d at 59 [App. A at p. A30].

29. 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

30. *Id.* at 420, 421 (emphasis in original).

HUD's one study was nothing more than an evaluation of the Developer's studies. The inter-disciplinary team of New Communities Development staff members mentioned by the Circuit Court[31] was, as the Court noted,[32] composed of a civil engineer, a lawyer, an economist, an urban planner, a financial expert and an architect, but not one environmental expert. (Moreover, none of these alleged experts prepared any studies.) It was not until three months after HUD's first Final EIS was issued in January of 1972, and after the commitment had been made to the Developer, that HUD even employed Dr. Beck, its sole environmental consultant (Tr 1448); and by Dr. Beck's own testimony his sole function was to *review* the studies prepared by the Developer and not to make his own independent investigation (Tr 1450, 1485). In fact, Dr. Beck was on the Development site only one time (Tr 1441).

Since Dr. Beck performed no tests of his own, he (and HUD) had no choice but to accept all of the Developer's premises and facts as correct. HUD's principal witness, Mr. DeVito, even admitted during trial that in writing its EIS's HUD gave controlling significance to the Developer's findings:

> "They are the developer's numbers which we have reviewed and have put into the Impact Statement as an indication of what appears to be the professional judgment of this developer as to what will happen there." [Tr. 1664]

Understandably, the consultants hired by the Developer, which stood to reap a $103 million profit from this venture, made findings favorable to the project.

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31. 502 F.2d at 59 [App. A at p. A31].

32. 502 F.2d at 49 [App. A. at p. A13].

The cases cited by the Circuit Court do not support its decision on this point. In two of those cases[33] a State Highway Department was permitted to participate in the EIS process, which is totally different from abdicating EIS responsibilities to a financially interested private developer. In the third case, from the Ninth Circuit,[34] the federal agency had previously conducted its own pre-NEPA studies and therefore was not forced to rely upon data secured by the private consulting firm, as HUD did in the instant case.

For the future, the Fifth Circuit's opinion means that federal agencies can delegate responsibility for the environmental studies to the biased applicant who is seeking a favorable EIS and then go through a perfunctory review process. Petitioners submit that this is erroneous as a matter of law and is comparable to a court's adopting an opinion researched and drafted by one side of a lawsuit without doing any independent research on its own.

C. HUD's EIS's Do Not Assess Secondary Impacts of the Development

The EIS recognizes that the proposed development will attract parasite developments housing up to 40,000 additional people who will not be subject to the environmental controls imposed upon the Developer by HUD (Tr 696-98; DX-C-2 Exh. 3, p. 41). Yet there is no discussion whatsoever of the environmental impact these 40,000 people will have on the Aquifer.

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33. *Iowa Citizens for Environmental Quality, Inc.* v. *Volpe*, 487 F.2d 849 (8th Cir. 1973) and *Citizens Environmental Council* v. *Volpe*, 484 F.2d 870 (10th Cir. 1973), *cert. denied*, ... U.S. ..... (April 15, 1974).

34. *Life of the Land* v. *Brinegar*, 485 F.2d 460 (9th Cir. 1973), *cert. denied*, ... U.S. ..... (April 22, 1974).

The Council on Environmental Quality in its regulations has recognized that an EIS must consider secondary or indirect consequences of a federal project and has noted that these secondary impacts "may often be more substantial than the primary effects of the original action itself."[35]

The Fifth Circuit's refusal to find the EIS inadequate for failing to discuss the impact of parasite developments is in direct conflict with the First Circuit's decision in *Silva* v. *Lynn*,[36] where the court faulted HUD because its EIS was "myopic in the sense of focusing on the project site itself, with no supported judgment as to what will happen in other areas nearby."[37]

D. HUD Improperly Committed Itself to the Project Before the NEPA Studies Were Performed

It is undisputed that HUD made a tentative decision to extend a commitment to the Developer in October 1971, one month after the draft EIS was issued, and over three

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35. 40 C.F.R. § 1500.8(a)(3)(iii). It is particularly significant that the official report of the Texas Water Quality Board on the proposed new town made the following comments on the project's secondary impacts:

> "It should be pointed out that a construction of a town on the original nine thousand two hundred acres, will open Pandora's box and cause additional development around the town. This additional development undoubtedly would have had less control than those proposed for San Antonio Ranch. Consequently, within a few short years, the water supply for San Antonio would have to be treated, particularly chlorination, to safeguard the health of its residents." [PX-44; attached as Appendix F to this Petition at page A101.]

Curiously, this report was left out of HUD's EIS.

36. 482 F.2d 1282 (1st Cir. 1973).

37. *Id.* at 1286.

months before the first Final EIS was distributed.[38] In challenging this procedure Petitioners argued to the Fifth Circuit that HUD violated CEQ's guidelines *and its own regulations.*

The Court sidestepped this issue by holding that CEQ's guidelines "although highly persuasive, do not govern compliance with NEPA."[39] No mention, however, is made of HUD's own regulations which provide as follows:

> "A 'final environmental statement' is the mature revised draft required by statute to incorporate external comments, to be filed with the CEQ, and accompany the proposed action through the department's review and decision processes. *It is the clear intent of the legislation that the final environmental impact statement be completed and filed with the CEQ prior to even tentative HUD commitment or approval.*
>
> "[I]t is undesirable and inappropriate to approve projects subject to environmental clearance. It is departmental policy that environmental clearances shall be part of the generic review process and shall not be separated for later approval."[40]

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38. Exhibit 41 to the Developer's Response Brief in the Fifth Circuit is the Minutes of the October 12, 1971 Board of Director's Meeting of HUD's Community Development Corporation. It shows the following action took place:

> "After full discussion, a motion was duly made and seconded, confirming and ratifying previous conference telephone action taken by the Board to authorize an offer of commitment at the earliest appropriate time to the developer of San Antonio Ranch, Texas. The motion was unanimously passed."

39. 502 F.2d at 58 [App. A at p. A29].

40. Department of Housing & Urban Development Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality § 1385.1, Appendix A Parts I(8) & II (emphasis added).

When HUD voted to extend a commitment to the Developer in October of 1971, it violated its own regulations proscribing even tentative commitment or approval prior to filing of the Final EIS. When it formalized its commitment in February 1972 and made that commitment subject to environmental clearance, it violated the second regulation above.

Further, even if there were no HUD or CEQ regulations on this point, NEPA itself clearly anticipates the preparation of an adequate EIS *before* agency action occurs. The Fifth Circuit's approval of HUD's act of making the decision and then attempting to justify it through a tardy EIS is in direct conflict with the decisions of other courts.[41]

II

HUD'S COMMITMENT TO THE DEVELOPER VIOLATES THE NEW COMMUNITY ACT

The decision rendered by the Fifth Circuit in this case appears to be the first appellate interpretation of the Urban Growth and New Community Development Act of 1970[42] (New Community Act). That Act provides for

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41. *Arizona Public Service Co.* v. *FPC*, 483 F.2d 1275, 1283 n.24 (D.C. Cir. 1973) (agency cannot make a decision and then "bootstrap itself into the position"); *Scientists' Institute for Public Information, Inc.* v. *AEC*, 481 F.2d 1079, 1094 (D.C. Cir. 1973) (EIS "must be written early enough so that whatever information is contained can practically serve as input into the decision making process."); *Committee To Stop Route 7* v. *Volpe*, 346 F. Supp. 731, 738 (D. Conn. 1972) ("If the act is seen as requiring only full disclosure, it will simply become a minor nuisance for agencies, imposing one more obligation of paperwork before they can get on with projects they intend to build. That approach will simply pave (or at least litter) the road to environmental chaos . . . ."); *EDF* v. *Hardin*, 325 F. Supp. 1401, 1403 (D.D.C. 1971) ("The Act envisions that program formulation will be directed by research results rather than that research programs will be designed to substantiate programs already decided upon.")

42. 42 U.S.C. § 4501 et seq.

federal loan guarantees and other assistance to private developers wishing to develop large areas of land as new communities. The Act recognizes that present national growth patterns have promoted undesirable trends which the Act seeks to correct by offering assistance to those planned developments which will either alleviate or reverse the undesirable growth traits in this Nation's cities and towns.

Throughout the proceedings in this case, Petitioners have alleged that placement of the proposed Development in the area of Bexar County, Texas which is already experiencing inordinate growth by comparison to other sectors of the County, on top of the Recharge Zone to San Antonio's sole water supply, twenty miles from the Central City, in an area where there is an over-utilization of traffic arteries and where no utilities or sewage presently exist, is not only bad planning but is contrary to the clear intent and purpose of Congress in enacting the New Community Act.

Because of its magnitude and the potential destruction that the proposed project may inflict upon the standard of living for Bexar County's one million people and because the New Community Act has not yet received any interpretation by this or any other appellate court except the court below, a Writ of Certiorari should issue out of this Court to the United States Court of Appeals for the Fifth Circuit.

The New Community Act sets out eight goals and principles which the Act is designed to achieve,[43] ten un-

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43. The eight goals and principles of the New Community Act as set out in 42 U.S.C. § 4502 are:

1. The project should "offer a range of alternative locations . . ." and "increase the wise and balanced use of physical and human resources."

(Continued on following page)

desirable urban growth patterns which the Act is designated to correct,[44] and eight eligibility requirements which

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Footnote Continued—

2. HUD's actions should "foster the continued economic strength of . . . central cities."

3. The National urban growth policy should "help reverse trends of migration. . . ."

4. The urban growth policy should treat comprehensively the problems of poverty and unemployment (including the erosion of tax bases).

5. HUD must "encourage good housing . . . without regard to race or creed."

6. HUD is obligated to a policy of "revitalizing existing communities. . . ."

7. The new community must "contribute to a balanced urban growth. . . ."

8. HUD approved projects must "encourage desirable patterns of urban growth . . . and stabilization. . . ." While the Act does not say what are desirable patterns of urban growth, it does set out what are undesirable patterns of urban growth in 42 U.S.C. § 4511(b).

44. The ten undesirable patterns of urban growth that Congress sought to alleviate are set out in 42 U.S.C. § 4511(b):

1. The "inefficient and wasteful use of land resources which are of national economic and environmental importance. . . ."

2. The continued "destruction of irreplaceable natural and recreational resources and increasing pollution of air and water. . . ."

3. The "diminished opportunity for the . . . home-building industry to . . . replace substandard housing. . . ."

4. The "costly and inefficient public facilities and services at all levels of government. . . ."

5. The "unduly limited options for many . . . people as to where they may live, and the types of housing and environment in which they may live. . . ."

6. The "failure to make the most economic use of . . . smaller cities and towns. . . ."

7. The deterioration of the nation's central cities and their diminished tax base.

8. The "further separation of people within metropolitan areas by income and by race. . . ."

9. The "further increases in the distances between the places where people live and where they work and find recreation. . . ."

10. The "increased cost and decreased effectiveness of public and private facilities for urban transportation."

must be met before a project is eligible for New Community assistance.[45]

The proposed Development does not meet any of the eight eligibility requirements and fails to satisfy any of the Act's eight goals and principles. It will, however, further aggravate all ten undesirable growth patterns which Congress had hoped to correct.

The proposed Development will be an 88,000-person city located in the northwest quadrant of Bexar County, twenty miles from the central city of San Antonio (DX-C-1, pp. 10-25). The project will attract an additional 40,000 residents in parasite developments (DX-C-2 Exh. 3, p. 41). Those 40,000 residents will not be subject to HUD's environmental controls.

The northwest quadrant is already experiencing an inordinately high growth rate, while other quadrants of

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45. The eight eligibility requirements that a project must meet, as set out in 42 U.S.C. § 4513(a), are as follows:

1. The project must "provide an alternative to disorderly urban growth" or "help reverse migration from existing cities. . . ."

2. The proposed project must be economically feasible.

3. The project "will contribute to the welfare of the entire area . . . affected. . . ."

4. The project must be "consistent with comprehensive planning . . ." for the area.

5. The project must have "received all governmental reviews and approvals required by State or local law, or by the Secretary. . . ."

6. The new community must be served by adequate transportation facilities.

7. The project must make "substantial provision for housing within the means of persons of low and moderate income and that such housing will constitute an appropriate proportion of the community's housing supply. . . ."

8. Before an offer of commitment is extended the significant use of advanced design and technology and methods of construction must be shown.

the County lag pitifully behind (DX-C-1, pp. 23-24). Since the proposed Development will accelerate growth in the northwest quadrant by 128,000 persons, there will result a further imbalance in the growth rate of the Bexar County area and the project will aggravate the existing trends of migration from the central city and southside to the northwest (Tr 551, 595, 709, 731).

Because of the disproportionate growth rate on the northwest side, traffic networks are already tremendously overutilized and congested while the traffic facilities on the southside are being wasted by inactivity (Tr 587-92; PX-37, PX-33). The Development will result in further overutilization and congestion on the northside traffic arteries (Tr 594). The project will cause a further increase in the distance between the places where people live and where they work and find recreation, thereby increasing the number of cars on the road and increasing dependency on the automobile (Tr 1640, 1689, 1695).[46]

Utilities and public works facilities do not presently serve the many vacant miles between San Antonio and the Development site; therefore, a completely new utility and sewage system will have to traverse the vast expanse between the supplier (San Antonio) and the Development (Tr 695, 708).

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46. In this regard the Development violates not only the mandate of the New Community Act, but the entire national policy on transportation in the President's Message of March 8, 1973:

> "To thrive, a community must provide for the efficient movement of its people and its products. Yet in recent years, the growing separation of the city from its suburbs and changing employment patterns have made transportation more of a community problem than a community asset. To improve community development we must meet the challenge of transportation planning and provide more flexible means for communities to meet their transportation needs."

The central portion of San Antonio and near southside are already suffering from the affliction of inner city deterioration and erosion of tax base due to the flight of the white upper and middle class to the suburbs (Tr 709, 731). The result has been a further polarization between the white middle and upper class and the minority Mexican-American and Black residents, who historically live on the east and southside, close to job sites and public transit facilities (Tr 1728). Because of the distance and economic factors, these two minority groups will not be attracted to the project, thereby causing a further separation of people by income and race (Tr 709, 1728, 1730, 1733, 1735; PX-18, PX-19, PX-20). Further, the project's General Development Plan contemplates the use of section 235 and 236 low income financing to meet the Act's eligibility requirement for attracting minorities and low income groups (DX-C-4, p. G-20-21). These programs, however, were eliminated on January 5, 1973, and are no longer available. Urban Affairs Reporter ¶¶ 2511, 2751, 2861, 2881. In fact, those programs were eliminated even before HUD accepted the General Development Plan. No studies were made by HUD to determine whether minority and low income groups would be attracted to a project so distant from job locations and present residences.[47] It is undisputed on the record, however, that minorities will not be attracted to the Development (Tr 1755).

The San Antonio metropolitan area presently is not covered by a comprehensive areawide plan or by ongoing

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47. It is a fundamental planning precept that population distribution studies be made before embarking on a major project affecting an area. Chapin, URBAN LAND USE PLANNING, Chapter 5, pp. 181-217.

planning as required by the New Community Act and by HUD's regulations (Tr 1577, 1579).[48]

The Honorable Appeals Court erroneously concluded that the Alamo Area Council of Governments had conducted the ongoing comprehensive plan for the area at HUD's behest.[49] HUD's own witness stated that AACOG

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48. It is an eligibility requirement that the project be consistent with areawide comprehensive planning. 42 U.S.C. § 4513 (a)(4). In deference to this particular eligibility requirement, HUD, in its New Community Act Regulations, has provided as follows: "The area within which a new community is to be situated *must* be covered by a comprehensive areawide plan or by ongoing planning promulgated or carried on by a duly authorized agency. . . . . The location of the new community must be consistent with such comprehensive plan." 24 C.F.R. § 32.7(f) (emphasis added).

When there is no comprehensive plan covering an area, the Regulations state that the Secretary of HUD is instructed:

> ". . . to make comprehensive planning grants up to 75 percent of cost to official governmental planning agencies for planning areas where rapid urbanization is expected to occur on land developed or to be developed as a new community under the Act." 24 C.F.R. § 32.1(4)

HUD's own representative admitted in his testimony that the proposed project does not meet this eligibility requirement (Tr 1577-1579). HUD has been instructed before that it is bound by and must follow its own regulations. *Silva* v. *Romney*, 342 F. Supp. 783 (D. Mass. 1972).

Not only is a comprehensive areawide plan or ongoing planning by an authorized agency required by the Act and HUD's Regulations, but HUD's Circular on Areawide Planning Requirements states that such plan must be developed so that a proposed project will address itself to area problems of minority and low income housing and the ". . . interrelationships between educational facilities, employment centers, transportation, taxation, intergovernmental relations, etc. as they relate to housing and development." The Circular sets out the basic components which must be considered in the planning process, including the "systematic collection and analysis of data relating to population, economic factors, health, education, welfare services, land uses, transportation, community facilities, government organization and other factors relating to problems and opportunities."

By failing to initiate any systematic collection and analysis of data with regard to the project's impact on areawide urban factors, HUD could not comply with either its own Planning Circular or established planning principles.

49. 502 F.2d at 56-57 [App. A at p. A26].

did not conduct any areawide planning, nor did it have authority to do so (Tr 1577, 1616-17). AACOG's sole participation in the process was to write two short, two-page letters to HUD warning of potential dangers to the Recharge Zone through storm water runoff and sewage disposal. Neither letter deals with even a semblance of comments on area planning; in fact, AACOG acknowledged in its warning letter of October 28, 1971, that it never considered areawide planning aspects of the project.[50]

HUD wholly failed to conduct any studies or evaluate the impact of the proposed project on any of the area urban problems which the New Community Act sought to alleviate, but this is not the first time HUD has failed to analyze the impact a project will have on the human-social environment.[51]

The Fifth Circuit dismissed HUD's absolute failure to adhere to the Congressional purposes and intents expressed in the Act by stating:

> "Furthermore, the national urban growth policy and the detrimental effects of present patterns which Congress codified operate only as guideposts to inform the Secretary's discretion and judicial review of his

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50. "We have not commented in such areas as air pollution, the economic impact of the proposed project, the transportation network, etc. We do feel, however, that the developers should address themselves equally to these aspects of the New Town because of their direct and indirect relationship to the project." [DX-C-4, Vol. 5, III Tab. B].

51. *Shannon* v. *HUD*, 436 F.2d 809 (3d Cir. 1970): In that case the Court held that HUD failed to consider all relevant impacts of a proposed project:

> "When an administrative decision is made without consideration of relevant factors it must be set aside. . . . Here the agency concentrated on land use factors and made no investigation or determination of the social factors involved in the choice of type of housing which it approved. . . . We hold . . . that the Agency must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties. . . ." [*Id.* at 819, 821].

substantive decision. Neither creates any judicially enforceable rights."[52]

Petitioners submit that when agency action taken under authority of a Congressional Act is contrary to the purposes and goals of that authorizing Act then it is the Court's responsibility to interpret and enforce those purposes as was done by the Third Circuit in *Shannon* v. *HUD*.[53]

PRAYER

HUD, in its exuberance to be the benefactor of yet another federal project, has trampled over the very goals designed for it by Congress and has overrun the basic human needs of a particularly unique urban environment in Bexar County, Texas.

Petitioners respectfully submit that Certiorari issue in this cause.

Respectfully pray,

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Dated: April 15, 1975

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52. 502 F.2d at 55 [App. A at p. A23].
53. *Supra* note 51.

APPENDIX A

SIERRA CLUB et al., Plaintiffs-Appellants-Cross Appellees,

Edwards Underground Water District et al., Intervenors-Appellants-Cross Appellees,

v.

James T. LYNN, Secretary of the U. S. Department of Housing and Urban Development, et al., Defendants-Appellees-Cross Appel'ants,

San Antonio Ranch, Ltd., Defendant-Appellee-Cross Appellant,

Texas Water Quality Control, Intervenor.

No. 73–3378.

United States Court of Appeals, Fifth Circuit.

Oct. 4, 1974.

Citizens groups brought action for declaratory and injunctive relief with respect to development of new community under housing and urban development program. State Water Quality Board intervened on behalf of defendants, and underground water district intervened with county on behalf of plaintiffs. The United States District Court for the Western District of Texas at San Antonio, Adrian A. Spears, Chief Judge, 364 F.Supp. 834, entered orders and appeals were taken. The Court of Appeals, Clark, Circuit Judge, held that Secretary of HUD acted neither arbitrarily nor capriciously, nor failed to act in accordance with law when he determined to grant developers of the new community federal assistance under the Urban Growth and New Community Development Act; that environmental impact statement filed by HUD was

sufficient; that plaintiffs failed to state claim under the Water Pollution Prevention and Control A that in absence of proof that developer controlled the gove ment agency's actions or caused its default, it could not be ' in judgment for attorney fees; and that as there remained r unadjudicated claim upon which relief could be gra ed, trial court improperly retained jurisdiction.

Affirmed in part, reversed in part and remanded.

1. United States ⇐53(9)

Judicial review of decision of Secretary of HUD to guarantee financing for initial development of new community was governed by the Administrative Procedure Act. 5 U.S.C.A. §§ 701 et seq., 706(2)(A); 28 U.S.C.A. § 1331(a).

2. United States ⇐53(9)

Appropriate standard of review of decision of Secretary of HUD to guarantee financing for initial development of new community was whether the Secretary's action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, and reviewing court would determine whether the agency considered all relevant factors in reaching its decision, or whether the decision itself represented a clear error of judgment. 5 U.S.C.A. § 706(2)(A).

3. United States ⇐53(9)

Where none of the facts necessary to sustain plaintiffs' attacks on HUD's compliance with the applicable federal statutes in deciding to guarantee financing for new community were unavailable to plaintiffs or within the exclusive possession or undisclosed by the agency, trial court properly required plaintiffs to establish their claims by a preponderance of the evidence as to each of their claims. 5 U.S.C.A. § 706(2)(A).

4. Courts ⇐406.3(24)

Findings, in action to prevent development of new community pursuant to program of housing and urban develop-

ment, that HUD did not act arbitrarily, capriciously or unlawfully when it found the community to satisfy each statutory condition for federal financing guarantee were not clearly erroneous. New Communities Act of 1968, § 402 et seq., 42 U.S.C.A. § 3901 et seq.; Urban Growth and New Community Development Act of 1970, §§ 701–703, 712, 42 U.S.C.A. §§ 4501–4503, 4513.

5. Health and Environment ⇐25.5

HUD's commitment to guarantee $18,000,000 in bond obligations for development of new community pursuant to program of housing and urban development constituted a "major federal action" significantly affecting the quality of the human environment, subjecting that decision to the full disclosure provisions of the National Environmental Policy Act. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

See publication Words and Phrases for other judicial constructions and definitions.

6. Health and Environment ⇐25.10

Council on Environmental Quality guidelines providing 30-day period for circulation of impact statement for public comment, although highly persuasive, do not govern compliance with the National Environmental Policy Act. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

7. Health and Environment ⇐25.10
United States ⇐53(9)

HUD's commitment to guarantee bond obligations for new community, and HUD's environmental impact statement, were not fatally undermined by the direct participation of the developer and his experts in the underlying environmental and other studies. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

8. Health and Environment ⇐25.10

The National Environmental Policy Act does not permit the responsible federal agency to abdicate its statutory duties

by reflexively rubber-stamping an environmental impact statement prepared by others; the agency must independently perform its reviewing, analytical and judgmental functions and participate actively and significantly in the preparation and drafting process. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

9. Administrative Law and Procedure ⇐476

In absence of bad faith or misplaced reliance, an agency faced with numerous applications for assistance and endowed with finite internal resources to implement congressional policy cannot be expected to ignore useful and relevant information merely because it emanates from an applicant.

10. Health and Environment ⇐25.10

Guidelines of Council on Environmental Quality and the Environmental Protection Agency regulations regarding preparation of environmental impact statements contemplate submission of initial environmental information by the applicant to the agency. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

11. Health and Environment ⇐25.10

HUD did not improperly delegate its statutory responsibilities in preparing environmental impact statement for new community by reason of the participation of the developer and his experts in the underlying environmental and other studies. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

12. Health and Environment ⇐25.10

Inasmuch as district court's order holding in abeyance litigation concerning development of new community under housing and urban development program and developer's agreement to HUD's call for a moratorium on construction effectively maintained the status quo pending completion of addendum to HUD's environmental impact statement, it was not incumbent on court to require that HUD withdraw its

contingent commitment offer. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

13. Health and Environment ⇐25.10

While formally correct environmental impact statements and technical compliance with the National Environmental Policy Act and complimentary guidelines are required, an initial finding of noncompliance must not irrevocably preclude eventual compliance; compliance must be measured by the contents of the final statement. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

14. Health and Environment ⇐25.10

HUD's environmental impact statement for new community was not insufficient on theory it failed to examine the secondary or indirect environmental impacts from expected neighboring "parasite" developments; to set out a cost-benefit analysis of the project; to consider cumulative impacts; to discuss adequately the relationship between local short-term uses of the environment and maintenance and enhancement of long-term productivity; or to treat fully outside comments and opinions. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

15. Health and Environment ⇐25.10

That factors in determining environmental costs and risks with respect to development of new community under housing and urban development program are generally imprecise and unquantifiable does not render impact statement inadequately detailed. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

16. Health and Environment ⇐25.5

National Environmental Policy Act does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

17. Health and Environment ⇐25.10

Sufficiency of environmental impact statement under the National Environmental Policy Act must be judged in light of the nature of the federal action and the underlying implementing federal legislation. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

18. Health and Environment ⇐25.10

Agency providing environmental impact statement must consider appropriate alternatives which may be outside its jurisdiction or control, and not limit its attention to just those it can provide. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

19. Health and Environment ⇐25.10

HUD's environmental impact statement with respect to development of community lying on portion of zone of land taking surface waters to underground water-bearing formation supplying water for city of San Antonio was not insufficient by reason of failure to discuss either the acquisition of the recharge zone as a park at a prohibitive cost, or the elimination of all federal assistance to any development over the recharge zone. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

20. United States ⇐53(9)

Statute permitting HUD to plan large-scale projects on federally owned lands does not obligate HUD to search out a competing applicant willing to develop and finance a project on an alternate site or to work up a counterproposal of its own before it can pass on the merits of a properly submitted new community application. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

21. Health and Environment ⇐25.10

HUD's environmental impact statement pertaining to new community application fully complied with the National Environmental Policy Act where it furnished sufficient information to permit a reasoned choice of alternatives so far as

environmental aspects were concerned. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

22. Health and Environment ⇐28

Precautions required by HUD to protect quality of water supplied to residents of city of San Antonio by area on which new community was to be constructed were adequate. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

23. Health and Environment ⇐28

Citizens' groups suing to prevent development of new community to be located astride portion of zone of land supplying water to city of San Antonio failed to state claim for violation of Federal Water Pollution Control Act. Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 101(a), 102(a), 301, 309, 33 U.S.C.A. §§ 1251 et seq., 1251(a), 1252(a), 1311, 1319.

24. Federal Civil Procedure ⇐2737.6

In absence of proof that the private party controlled the government agency's actions or caused its default, private party cannot be cast in judgment for attorney fees as a result of the agency's shortcomings even if agency is immune from liability for financial redress.

25. Federal Civil Procedure ⇐2737.6

Citizens' groups which brought action which directly caused HUD's full compliance with National Environmental Policy Act on new community project could not recover attorney fees from developer which successfully defended the lawsuit and which was not shown to have been unreasonable or to have unduly protracted the litigation. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; 28 U.S.C.A. § 2412.

26. Courts ⇐30

Rendition of definitive judgment in suit to prevent development of new community under housing and urban develop-

ment program ended the litigable aspects of the dispute and, in absence of evidence indicating that HUD would fail to discharge faithfully its statutory functions, trial court improperly retained jurisdiction. 28 U.S.C.A. § 1331(a).

27. Health and Environment ⇐25.5

District court must abjure the role of a quasi-administrative agency for environmental affairs. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

28. United States ⇐53(9)

Judgment and grant of relief disposing of litigation seeking to prevent development of new community under housing and urban development program could compel parties to file in a convenient local public office such reports as they might in the future make that contain material of public interest. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

29. Courts ⇐281

Although mere voluntary cessation of allegedly illegal conduct does not moot a case, federal jurisdiction must be founded upon at least a mere possibility of recurrence which serves to keep the case alive.

Appeals from the United States District Court for the Western District of Texas.

Before WISDOM and CLARK, Circuit Judges, and GROOMS, District Judge.

CLARK, Circuit Judge:

An offer of commitment by the United States Department of Housing and Urban Development (HUD) to guarantee an 18 million dollar private bond issue for the development of San Antonio Ranch New Town (Ranch) spawned this environmentalist litigation against defendants James T. Lynn, Secretary of HUD, and San Antonio Ranch, Ltd., the developer.

SIERRA CLUB v. LYNN

Charging violations of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq., and the Urban Growth and New Community Development Act of 1970 (Title VII), 42 U.S.C. § 4501 et seq., four citizens groups (the Sierra Club, Citizens for a Better Environment, League of Women Voters of the San Antonio Area, and American Association of University Women, San Antonio Branch) and their individual members, as plaintiffs, sought declaratory and injunctive relief barring defendants from issuing or accepting either the bond guarantee or any other federal assistance supporting development of the Ranch until the proposed project complied with NEPA and Title VII. Thereafter, the district court permitted the Texas Water Quality Board to intervene on behalf of the defendants, and the Edwards Underground Water District, which had intervened along with Bexar County, Texas on behalf of the plaintiffs, amended its original complaint to allege that development of the Ranch also contravened the Water Pollution Prevention and Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq.

Depending upon which party's view is accepted, the Ranch will be either an urban planner's utopia incarnate or an environmental disaster of the first magnitude. As conceived by the developer, a limited partnership composed of individuals experienced in real estate, construction, financing and new town management, the Ranch will convert 9,318 acres of predominantly virgin Texas hill country land in the northwest quadrant of Bexar County, Texas into a "free standing" new community of 87,972 residents living in 28,676 housing units (41%—single family detached houses, 6%—townhouses, 45%—medium density apartments, and 8%—high density apartments), of which one-fourth will accommodate low and moderate income families, through staged construction over a 30-year period. The Ranch site, which is presently virtually undisturbed and primarily used for ranching, grazing and occasional hunting, is dominated topographically (85%) by hill country and rocky soil characterized by 100 to 200 ft. differen-

tials in elevation. The southern 1200 acres (15%) consists mainly of flat terrain and agriculturally productive soil. An expanding network of regional highways serving the area will be supplemented by an external mass transit system connecting the Ranch to downtown San Antonio, approximately 20 miles away, the South Texas Medical Center, a distance of 10 miles, the University of Texas at San Antonio, a 6-mile trip, and the San Antonio International Airport, currently a 25-minute drive. The developer will contract for essential municipal services and public utilities with the City of San Antonio, whose City Council has adopted a resolution favoring eventual annexation of the entire project.

More than half of the Ranch acreage will be devoted to residential development and internal roads. The project contemplates over 2200 acres of open space, which includes a 2,000 acre greenway system, two 18-hole golf courses, three recreational use lakes, neighborhood recreation centers with swimming pools and tennis courts and a continuous hiking and bicycle trail system. 12,750 employees are expected to work in two industrial and research and development parks totaling 1,234 acres. A 500 acre vocational training and technical center, featuring public or private affiliated educational and training facilities, will staff 430 employees, and it is estimated that 4,480 persons in public jobs will service the Ranch population. Of the 180 acres set aside for commercial use, 150 acres will be devoted to a town center that will act as the gateway to the entire Ranch, providing the focus of civic, entertainment, office employment and shopping activities. Two educational parks and 13 elementary school sites will cover 330 acres. In general the land use plan seeks to take maximum advantage of the area's variation in topography by clustering common or public facilities along an "activity belt," a major right-of-way loop that envelopes the community and laces its components together. The center of the Ranch forms a residential island and th network of canyons affords the basis for a continuous green belt system that will permit a person

to bicycle or walk or horseback ride from the town center to any point within the Ranch without crossing a major thoroughfare.

The spectre of environmental doom is raised by the fact that the proposed development lies astride a portion of the zone of land which takes surface waters to the Edwards Aquifer, an underground water bearing formation that is the sole water supply for the City of San Antonio and 1,000,000 area residents. The aquifer region has been estimated to be approximately 175 miles in length with a varying width of 5 to 45 miles, encompassing a crescent-shaped surface area of 3½ million acres that extends over more than 7 counties. Ground water flows freely (in terms of miles per day) in an easterly direction through the Edwards formation of extremely permeable limestone, which averages 500 feet in thickness, until it is cut by the Balcones fault system. Northwest of the fault the surface limestone is upthrown to form the Edwards Plateau. In this region, honeycombed with fissures and cracks, ground water percolates through the stratum and is found under normal, unconfined water-table conditions. Southeast of the fault line, however, the limestone formation is downthrown, sloping from a surface recharge area near the fault line south and east hundreds of feet below the surface, and overlaid with less permeable and younger rocks, which confine the ground water in the underground reservoir from which San Antonio draws its water supply.

The artesian reservoir is replenished annually with approximately 500,000 acre feet of water from three major sources. Most of the recharge is attributable to 14 surface streams on the Edwards Plateau that flow across fractures and joints in the fault zone, through which water filters down to the aquifer. This recharge zone varies in width from ½ to several miles and extends 80 or more miles above the Balcones fault system. It consists of many small pores and fissures inlaid among less permeable material. The second major source is underflow from one area of the reservoir that recharges

another. Least significant is the recharge produced from rain falling directly on the exposed "outcrops" of limestone in the upthrown region. This precipitation seeps through honeycombed passages and eventually filters its way into the reservoir.

Plaintiffs contend that if water entering the recharge zone is polluted, the entire aquifer will become contaminated. The Balcones Fault dissects the Ranch site latitudinally at the Haby Crossing Fault. Only about 13% of the annual rainfall on the site is eventually introduced to the underground reservoir. The rest is consumed by vegetation, evaporated or removed as surface run-off. Since none of the 14 major stream beds or recharge areas is located on the Ranch, the recharge emanating from the Ranch is generally estimated at only one-half of one percent of the total annual recharge to the aquifer.

The Ranch moved from the drawing board to the bureaucracy when the developer approached HUD in February of 1970 to explore the possibilities of federal assistance under Title VII. Marketing studies had shown that the development envisioned by the preliminary master plan would capture 15% of Bexar County's projected growth. During the prior decade almost half of the county's total population increase (143,000) had occurred in the northwest quadrant, whose influx of residents was expected to continue. Favorably impressed with the planning studies and pre-application proposal, HUD invited the developer to submit a formal application. Eight months later HUD's Office of New Community Development received the formal application and fee of 5,000 dollars and undertook a full agency review of the project.

Early concern for the integrity of the aquifer surfaced in many quarters. At HUD's suggestion the developer retained a geologist-hydrologist, Dr. L. J. Turk, to examine the project. A review of the Ranch was conducted by the Alamo Area Council of Governments, a regional multi-governmental planning organization composed of 16 representatives from the

Edwards Water District, Bexar County and the 11 surrounding counties, which endorsed the project subject to two subsequently adopted conditions: (1) that HUD require thorough environmental impact studies, particularly as to the effect of storm water run-off; and (2) that the sanitary sewer system of the Ranch be connected and treated off the site by the City of San Antonio's regional waste water system. The Texas Water Quality Board and San Antonio city officials were informed of and commented upon the environmental hazards to the aquifer and the steps being taken to protect it. A team of HUD New Community Development staff members, including a civil engineer, a lawyer, an economist, an urban planner, a financial expert and an architect, was formed to prepare an environmental impact statement. The internal agency review of the Ranch's application culminated in a favorable Title VII critique of the project by the Assistant HUD Secretary for Community Planning Development, who submitted his report to the Board of Directors of HUD's Community Development Corporation in August of 1971 before the draft impact statement was circulated for public comment on September 13.

Of 13 public agencies solicited, 7 submitted written comments that were incorporated with comments volunteered by 9 other agencies or groups, including some of the plaintiffs, into the "final" impact statement issued on January 20, 1972 for further circulation and public comment.[1] Just over one month later, on February 23, 1972, convinced that the Ranch was eligible under the Act for a federal financing guarantee of up to 18,000,000 dollars, HUD proffered an offer of commitment that was contingent upon, *inter alia*, the developer's agreement to (1) a moratorium prohibiting development over the recharge zone of the aquifer until completion of a compre-

1. In December of 1971 the Edwards Underground Water District, the San Antonio Independent School District, the Bexar County Commissioners Court and the San Antonio River Authority adopted resolutions opposing urban development over the aquifer. Each resolution was included in an August 1972 addendum to the final environmental impact statement.

hensive environmental study of the recharge zone by the developer and until approval by the HUD Community Development Board and the Texas Water Quality Board of the measures proposed to protect the natural conditions disclosed by the study, (2) review and comment thereon by a public and interagency board organized to the satisfaction of HUD, and (3) the adoption of treatment methods and other continuing measures such as the monitoring of water quality, required by the Community Development Board and the Texas Water Quality Board.

On the same date plaintiffs filed their complaint in this action and sought a temporary restraining order. Without reaching the merits, the district court granted defendants' motion to hold the case in abeyance until the developer had satisfied the conditions in the offer of commitment and executed a project agreement with HUD. Subsequently, HUD formed the San Antonio Water Quality Advisory Review Board, composed of representatives from 18 public agencies and Bexa. County, which conducted four separate public meetings and examined the impact of the project on the aquifer. This group inspected four reports submitted by Dr. Turk and the developer's other experts concerning continued studies of storm water and ground water quality at the Ranch, geological mapping of the site and soil renovation of storm water. It also surveyed the developer's plans for sanitary sewage collection and treatment facilities; transportation and storage of dangerous liquids; solid waste storage, collection and disposal; storm water controls; water quality monitoring system; and the legal controls supporting the inspection and enforcement of environmental quality programs.

In addition, HUD retained Dr. Henry V. Beck, a Kansas State University geologist, who, assisted by associates with expertise in environmental health engineering, hydrology and soil mechanics, independently reviewed the environmental studies and aspects of the entire project. Citations of approv-

al of the Ranch by the advisory board and Dr. Beck and their recommendations for improving environmental controls over the aquifer and the water quality monitoring system were forwarded to HUD for consideration and inclusion with additional ecological and the underlying scientific studies in an addendum to the "final" impact statement, which was circulated on August 24, 1972 among 38 public agencies or groups for additional study and comment. The Alamo Area Council of Governments, the San Antonio City Council, Water and Public Service Boards, the Texas Water Quality Board, the Governor's office and the State Department of Health approved the project as environmentally sound and consistent with regional land use planning. In October HUD concluded that the developer had satisfied each of the conditions contained in the letter of commitment and proceeded to commence negotiations leading to a project agreement.

After lengthy pre-trial maneuvering and assimilation of 9 days and 1920 pages of trial testimony, which generated voluminous exhibits, including a seven volume administrative record and three impact statements, the district court denied the relief sought by plaintiffs and entered judgment for the defendants, concluding that HUD had complied with the provisions of each federal statute. Furthermore, the court resolved to retain jurisdiction over the lawsuit for so long as might be necessary to ensure that the proposed environmental safeguards are fully instituted and implemented, and to require the parties to file with the court copies of all data and reports relating to the Ranch and other developments in the surrounding area. Finally, counsel for the plaintiffs were awarded 20,000 dollars in attorneys' fees, costs and expenses to be paid by the defendant developer. Sierra Club v. Lynn, 364 F.Supp. 834 (W.D.Tex.1973).

Plaintiffs appeal from the decision on the merits for defendants, renewing each of their statutory contentions, and asserting that the court improperly saddled them with the burden of proof. They also appeal from the amount of the attorneys'

S.Ct. 2749, 37 L.Ed.2d 160 (1973). "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971).

[3] In a motion to the trial court plaintiffs asserted that "once a prima facie showing has been made that the federal agency has failed to adhere to the requirements of NEPA, the burden must, as a general rule, be laid upon this same agency which has the labor and public resources to make the proper environmental assessment and support it by a preponderance of the evidence contained in the impact statement." Sierra Club v. Froehlke, 359 F.Supp. 1289, 1335 (S.D.Tex.1973), reversed sub nom., Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974). Without formally responding, the district court apparently applied the standard burden of proof—plaintiffs were required to establish their claims by a preponderance of the evidence without any tactical shifting of that burden. Since none of the facts necessary to sustain plaintiffs' attacks on HUD's compliance with the applicable federal statutes were unavailable to the plaintiffs or within the exclusive possession of or undisclosed by the agency, the district court properly imposed the standard evidentiary burden on plaintiffs as to each of their claims. Sierra Club v. Callaway, 499 F.2d 982, 992 (5th Cir. 1974); *see* Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123 (5th Cir. 1974).

I.

The Urban Growth and New Community Development Act

Increasing concern over the deterioration of urban life led Congress to enact The Urban Growth and New Community Development Act as Title VII of the Housing and Urban Development Act of 1970, Pub.L. No. 91–609, 84 Stat. 1791, expanding a similar program that was authorized by the Housing and Urban Development Act of 1968, see 42 U.S.C.

fees award. The developer cross-appeals from the grant of such fees against it, and Secretary Lynn cross-appeals from the district court's determination to retain jurisdiction. For the reasons that follow, we affirm the decision of the court below on the merits, and reverse its award of attorneys' fees and its retention of jurisdiction.

[1, 2] The district court correctly ruled that it was vested with jurisdiction under 28 U.S.C. § 1331(a) and that plaintiffs possessed standing, *see* Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). It also properly concluded that judicial review of the Secretary's substantive Title VII decision to guarantee financing for initial development of the Ranch project is governed by the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq. Since neither Title VII nor the APA requires the agency to conduct a hearing or make formal findings when passing on new community applications, the appropriate standard of review is whether the Secretary's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see* Camp v. Pitts, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). Under this standard the appellate court must determine whether the agency considered all relevant factors in reaching its decision, or whether the decision itself represents a clear error in judgment.

> Where NEPA is involved, the reviewing court must first determine if the agency reached its decision after a full, good faith consideration and balancing of environmental factors. The court must then determine, according to the standards set forth in §§ 101(b) and 102(1) of the Act, whether "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." Calvert Cliffs' Coordinating Committee v. U. S. Atomic Energy Commission, 146 U.S.App. D.C. 33, 449 F.2d 1109, 1115 (1971).

Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 300 (8th Cir. 1972), cert. denied, 412 U.S. 931, 93

§ 3901 et seq. Over the last century the increasingly mobile quality of life in America has produced a pattern of population redistribution in which the migration of persons from rural areas to a small number of densely populated, congested central cities is followed by the flight of middle and higher income families and businesses from these urban centers to the suburbs. This pattern of movement has resulted in a polarization of the residents of city and suburbia by income, race, education, social philosophy and life style.

In order to treat the source rather than the symptoms of such social, economic and environmental problems, Title VII was designed (1) "to provide for the development of a national urban growth policy," 42 U.S.C. §§ 4501–4503, and (2) "to encourage the rational, orderly, efficient, and economic growth, development, and redevelopment of our States, metropolitan areas, . . . and communities in predominantly rural areas . . . [and] the prudent use and conservation of our natural resources by assisting public and private efforts in the development of well-planned, comprehensive new communities that will contribute to better environments, produce improved living conditions, add to the supply of adequate housing, especially for persons of low and moderate income, promote sound economic growth and employment and provide a viable alternative to disorderly urban growth. 42 U.S.C. § 4501; *see also* 42 U.S.C. § 4511(f). To achieve its broad commitment, Congress envisioned that the federal government, acting through the Community Development Corporation, 42 U.S.C. § 4532, would assist four general types of new communities:

(1) Economically balanced new communities within metropolitan areas, which would serve as alternatives to urban sprawl;

(2) Additions to existing smaller towns and cities which can be economically converted into growth centers to prevent decline and accommodate increased population;

(3) Major new-town-in-town developments to help renew central cities, including the development of areas adjacent to existing cities, in order to increase their tax base; and

(4) Free standing new communities where there is a clear showing of economic feasibility, and which would be built primarily to accommodate expected population growth.

H.R.Rep. No. 91–1556, U.S.Code Cong. & Admin.News, 91st Cong., 2d Sess., at pp. 5582, 5587–5588 (1970,. As a result of its study of the problem, Congress found that the development of such new communities on a national scale had been crippled by the financial and administrative difficulties "of raising a large initial investment which would yield a delayed, irregular cash return; of assembling suitable sites of sufficient size; and in coordinating site and related improvements among all involved public and private sectors," Sierra Club v. Lynn, *supra*, 364 F.Supp. at 838; *see* 42 U.S.C. § 4511(e). Thus Congress provided in the Act for several forms of federal assistance including guarantees of the debt obligations of public and private new community developers to assist in financing land acquisition and development and in constructing public facilities, 42 U.S.C. § 4514.[2]

2. The eligibility requirements for Title VII financing guarantees are codified at 42 U.S.C. § 4513:

> (a) A new community development program is eligible for assistance under this part only if the Secretary determines that the program (or the new community it contemplates)—
>
> (1) will provide an alternative to disorderly urban growth, helping preserve or enhance desirable aspects of the natural and urban environment or so improving general and economic conditions in established communities as to help reverse migration from existing cities or rural areas;
>
> (2) will be economically feasible in terms of economic base or potential for economic growth;
>
> (3) will contribute to the welfare of the entire area which will be substantially affected by the program and of which the land to be developed is a part;
>
> (4) is consistent with comprehensive planning, physical and social, determined by the Secretary to provide an adequate basis for evaluating the new community development program in relation to other plans (including State, local, and private plans) and activities involving area population, hous-

After a developer has successfully traversed the application process and accepted an offer of commitment, the terms and conditions under which he must operate are negotiated with HUD and executed in a project agreement. A trust indenture and a development plan are required and must set out (i) all physical, environmental, planning and construction commitments over the 30-year development period, (ii) social goals and special features of the project, (iii) special studies required of the developer with respect to technological innovations and other aspects of the project incapable of resolution prior to execution, and (iv) the pace, scope and detail of the developer's undertakings in terms of 1-year, 3-year and long-term periods. These documents are incorporated into the project agreement and, hence, are enforceable at law. In addition, the developer is required each year to submit a new 1-year and 3-year plan and, if changed conditions warrant substantial alterations, a revised long-term plan. Substantial changes in

> ing and development trends, and transportation, water, sewerage, open space, recreation, and other relevant facilities;
>
> (5) has received all governmental reviews and approvals required by State or local law, or by the Secretary;
>
> (6) will contribute to good living conditions in the community, and that such community will be characterized by well balanced and diversified land use patterns and will include or be served by adequate public, community, and commercial facilities (including facilities needed for education, health and social services, recreation, and transportation) deemed satisfactory by the Secretary;
>
> (7) makes substantial provision for housing within the means of persons of low and moderate income and that such housing will constitute an appropriate proportion of the community's housing supply; and
>
> (8) will make significant use of advances in design and technology with respect to land utilization, materials and methods of construction, and the provision of community facilities and services.
>
> (b) A new community development program approved for assistance under this part shall be undertaken by a private new community developer or State land development agency approved by the Secretary on the basis of financial, technical, and administrative ability which demonstrates capacity to carry out the program with reasonable assurance of its completion.

any part of the development plan require approval by the Secretary.

The dynamic nature of the project's development process is intended to encourage flexibility in planning and to take advantage of new technology, research and innovation in the design and execution of new community development. A specific provision in the plan, which states that "[t]he developer shall comply with such further reasonable standards for environmental quality control as the Secretary may prescribe after consultation with other federal agencies pursuant to the National Environmental Policy Act of 1969," assures that other federal agencies retain influence over the developer's activities regarding environmental quality after the agreement has been executed. Moreover, another provision extends the developer's commitment to maintain environmental quality control for such additional period of time after completion of development as the Secretary may determine to be appropriate, and HUD states that it will prepare draft and final environmental statements with respect to any subsequent major actions connected with any such project, *i. e.* actions that have significant environmental quality implications.

[4] Plaintiffs contend that the Ranch (1) does not comport with the eight goals of the national urban growth policy announced by Congress; [3] (2) will promote the ten undesirable consequences which Congress found to result from unregulat-

3. (d) The Congress further declares that the national urban growth policy should—

(1) favor patterns of urbanization and economic development and stabilization which offer a range of alternative locations and encourage the wise and balanced use of physical and human resources in metropolitan and urban regions as well as in smaller urban places which have a potential for accelerated growth;

(2) foster the continued economic strength of all parts of the United States, including central cities, suburbs, smaller communities, local neighborhoods, and rural areas;

(3) help reverse trends of migration and physical growth which reinforce disparities among States, regions, and cities;

ed patterns of urban development,[4] and (3) fails to meet the eligibility requirements for federal assistance under the Act. The district court concluded that HUD did not act arbitrarily, capriciously or unlawfully when it found the Ranch to satisfy

> (4) treat comprehensively the problems of poverty and employment (including the erosion of tax bases, and the need for better community services and job opportunities) which are associated with disorderly urbanization and rural decline;
> (5) develop means to encourage good housing for all Americans without regard to race or creed;
> (6) refine the role of the Federal Government in revitalizing existing communities and encouraging planned, large-scale urban and new community development;
> (7) strengthen the capacity of general governmental institutions to contribute to balanced urban growth and stabilization; and
> (8) facilitate increased coordination in the administration of Federal programs so as to encourage desirable patterns of urban growth and stabilization, the prudent use of natural resources, and the protection of the physical environment.
>
> 42 U.S.C. § 4502(d).

4. (b) The Congress further finds that continuation of established patterns of urban development, together with the anticipated increase in population, will result in (1) inefficient and wasteful use of land resources which are of national economic and environmental importance; (2) destruction of irreplaceable natural and recreational resources and increasing pollution of air and water; (3) diminished opportunity for the private homebuilding industry to operate at its highest potential capacity in providing good housing needed to serve the expanding population and to replace substandard housing; (4) costly and inefficient public facilities and services at all levels of government; (5) unduly limited options for many of our people as to where they may live, and the types of housing and environment in which they may live; (6) failure to make the most economic use of present and potential resources of many of the Nation's smaller cities and towns, including those in rural and economically depressed areas, and decreasing employment and business opportunities for their residents; (7) further lessening of employment and business opportunities for the residents of central cities and of the ability of such cities to retain a tax base adequate to support vital services for all their citizens, particularly the poor and disadvantaged; (8) further separation of people within metropolitan areas by income and by race; (9) further increases in the distances between the places where people live and where they work and find recreation; and (10) increased cost and decreased effectiveness of public and private facilities for urban transportation.

42 U.S.C. § 4511(b).

each section 4513 condition for the 18,000,000 dollar federal financing guarantee.[5] None of these district court findings can be characterized on this record as clearly erroneous. Furthermore, the national urban growth policy and the detrimental effects of present patterns which Congress codified operate only as guideposts to inform the Secretary's discretion and judicial review of his substantive decision. Neither creates any judicially enforceable rights.

Urging that HUD made no studies of the Ranch's impact on San Antonio urban problems (transportation facilities, minority and low income distribution, inner city tax base, balanced growth or revitalization of the central city), plaintiffs argue that the Ranch cannot be consistent with comprehensive planning for the entire urban area, as required by section 4513(a)(4) and HUD regulations (since no such plan exists),

5. The findings were:
(1) The project will provide an alternative to disorderly urban growth;
(2) It will be economically feasible, in that it will capture more than 15% of the projected growth of Bexar County, because of its wide range of housing amenities and the superior environment;
(3) It will contribute to the welfare of the entire area, as existing septic tanks will be replaced with storm and sanitary sewers, and as industrial and commercial facilities will be placed in a setting encompassing a broad price range of housing;
(4) It is consistent with comprehensive physical and social planning;
(5) It has received all governmental reviews and approvals required by State or local law;
(6) It will contribute to desirable living conditions in the community, and will be characterized by well balanced and diversified land use patterns, and will include or be served by adequate public, community, and commercial facilities;
(7) It makes substantial provision for housing within the means of persons of low and moderate income;
(8) It will make significant use of advances in design and technology with respect to land utilization, materials and methods of construction, and the provision of community facilities and services; and
(9) A basis of financial, technical, and administrative ability which demonstrates capacity to carry out the program with reasonable assurance of its completion has been shown.
Sierra Club v. Lynn, *supra*, 364 F.Supp. at 839.

and that Bexar County, which must become responsible for governing and servicing the development, was never asked to approve the Ranch, as mandated by section 4513(a)(5).

The administrative record demonstrates that from the beginning HUD conceived of the Ranch as an integral element of the entire San Antonio community. The myriad economic, marketing, environmental and urban studies indicated that the project would provide a viable alternative (preserving and enhancing the existing natural amenities) to the rapid and disorderly urban growth projected for the northwest quadrant of Bexar County, an area devoid of governmental land use regulations or comprehensive water resource management planning. It is anticipated that this growth phenomenon will be exacerbated by the nearby construction of the University of Texas at San Antonio and the South Texas Medical Center. Thus, the orderly development of the Ranch should advance the goals of Title VII by retarding the expected and otherwise inevitable urban sprawl over the aquifer through implementation of a comprehensive land use plan which institutes demanding environmental controls in an ecologically sensitive area as well as by contributing to the welfare of the entire San Antonio community.

HUD evaluated the project's feasibility and its interrelation with the City of San Antonio by examining regional growth trends, population and employment distribution, market potentials, adequacy of regional transportation facilities and the long-term fiscal and economic impact of the Ranch on its adjacent political jurisdictions. These areas of concern were treated in the August 1971 report of the Assistant Secretary of HUD to the Community Development Board of Directors. He examined and the Board approved the Ranch with respect to each requirement of section 4513 and all applicable HUD regulations. To allay fears that the Ranch would counteract efforts to revitalize the downtown area of San Antonio, the developer submitted expert studies to the City Council that indicated a minimally harmful, if not an overall beneficial,

economic impact on the city and its tax base from the project. As a result the City Council rescinded its prior unfavorable position as to the Ranch and in February of 1972 voted to adopt a resolution supporting annexation of the Ranch in the future and to execute an agreement of cooperation with the developer: (a) to institute measures to protect the Edwards reservoir from pollution, (b) to channel all urban-type federal grants through the City, (c) to seek assistance from the developers with the planning, analysis and feasibility studies for a possible Title VII new-town-in-town project in San Antonio, and (d) to provide water, gas, electricity, sewerage and other municipal services to the Ranch under contract with the developer. In responding to comments to the "final" environmental impact statement, HUD stated that it would give full consideration to a new-town-in-town community in San Antonio regardless of the final action it took as to the Ranch.

Not only did both HUD and the developer endeavor to work closely and cooperate fully with state, local and city officials, the record also shows that the Ranch project "is consistent with comprehensive planning . . . determined by the Secretary to provide an adequate basis for evaluating the new community development program in relation to other [state, local and private] plans and activities . . .," 42 U.S.C. § 4513(a)(4), and "has received all governmental reviews and approvals required by State or local law, or by the Secretary," 42 U.S.C. § 4513(a)(5).

At the project's inception, no governmental entity exercised planning authority over the proposed site. "[N]either governmental controls over land use nor comprehensive and cohesive water resource management plans then existed in this area of Bexar County." Sierra Club v. Lynn, *supra*, 364 F.Supp. at 839. Bexar County, which was the only governmental body with jurisdiction over the entire ranch, had only residential subdivision regulations. Consequently, HUD selected the Ala-

mo Area Council of Governments to conduct a review of the Ranch in compliance with the Office of Management and Budget Circular A–95, which in general requires that an applicant for Title VII assistance notify the appropriate clearing house for the area in which the project is located of its intent to apply for such assistance in order to afford the clearing house and other interested local agencies an opportunity to comment on the proposed project. The district court determined that "the Alamo Area Council of Governments . . ., the Water Board of the City of San Antonio, the City of San Antonio Public Service Board, the Texas Water Quality Board, the Governor's office, and the Northside Independent School District had reviewed the project and decided that [the Ranch] was consistent with the comprehensive regional plan." 364 F.Supp. at 839.

Title VII does not state that the existence of a comprehensive regional land use plan is a condition precedent to federal assistance or that if no such plan is in effect, the Secretary must exercise his statutory authority to make comprehensive planning grants available to official governmental planning agencies where rapid urbanization is expected to occur on property to be developed as a new community, *see* 40 U.S.C. § 461. In this vein, draft HUD regulations provide that "the area within which a new community is to be situated must be covered by a comprehensive areawide plan *or by ongoing planning promulgated or carried on by a duly authorized agency.*" Proposed HUD Reg. § 32.7(f), 36 Fed.Reg. 14208 (1971) (emphasis added). These regulations also state that the comprehensive planning for the area must, in the secretary's judgment, be sufficiently detailed to provide a reasonable basis for evaluating the relationship of the proposed new community to other state, local and private plans and activities and that in those areas with a regional planning agency certified by the secretary, consistency must be found between the new community and the planning conducted by such agencies.

Plaintiffs do not assert that the Alamo Area Council was improperly certified by HUD or defaulted in its A–95 and regional planning responsibilities. There is no evidence that the council (among whose 16 members were representatives from plaintiff-intervenors, Edwards Underground Water District and Bexar County) inadequately discharged its planning and reviewing functions or erroneously determined that the Ranch was a viable project. Its conclusions were independently corroborated by various other local governmental agencies and were approved by the district court. Finally, that no official endorsement of the Ranch by Bexar County is required by state law is verified by a letter to HUD approving the Ranch from Bexar County Commissioners Court Judge Blair Reeves, who stated that though the county had no planning or zoning responsibility under existing state law, he found the project to be consistent with the San Antonio metropolitan area goals. This point was mooted in April of 1974 when the City Council of San Antonio voted to extend the city's extra-territorial jurisdiction over the Ranch from 58% to 100% of the proposed site.

The record before us does not support the claim that HUD failed to consider all relevant Title VII factors in reaching its decision or that the decision itself manifests a clear error in judgment. The legislative history of Title VII and HUD regulations thereunder clearly contemplate federal assistance for "free standing and self-sufficient new communities away from existing urban centers where there is a clear showing of economic feasibility, primarily . . . to accommodate [expected] population growth," as well as for new communities in metropolitan areas that are designed to combat urban sprawl and to renew deteriorating central cities. *See* proposed HUD Reg. § 32.7(a), 36 Fed.Reg. 14207 (1971). We hold that Secretary Lynn acted neither arbitrarily nor capriciously, nor failed to act in accordance with law when he determined to grant the developers of the Ranch federal assistance under the Urban Growth and New Community Development Act.

II.

National Environmental Policy Act of 1969

[5] NEPA was enacted to promote a national policy of "productive and enjoyable harmony between man and his environment," 42 U.S.C. § 4321, by demanding attention to environmental values and instituting an implementing methodology which would assure that these values were incorporated in agency planning and decision making processes. Because HUD's commitment to guarantee 18,000,000 dollars in bond obligations for the Ranch constituted a major federal action "significantly affecting the quality of the human environment," that decision became subject to the "full disclosure" provisions of NEPA, 42 U.S.C. § 4332(2)(C). As a result HUD filed three environmental impact statements—a draft statement on September 13, 1971, a final statement on January 20, 1972, and an addendum to the final statement on August 24, 1972.

The district court concluded that the final statement, as supplemented by the addendum, "though possibly not completely exhaustive in every respect, is sufficient to permit a reasoned decision as to the environmental effects of [the Ranch]" and "meets all the requirements for the 'detailed statement' required by NEPA . . . ." 364 F.Supp. at 842. Furthermore, the court determined that the Secretary's substantive commitment decision was neither arbitrary nor capricious nor an abuse of discretion since "HUD has complied with the goal of NEPA, . . . by '[using] all practicable means, consistent with other essential considerations of national policy' to carry out our nation's environmental policy." 364 F.Supp. at 844.

Plaintiffs attack these findings, contending that (1) the agency's offer of commitment to the developer was in violation of HUD regulations and Council on Environmental Quality guidelines since it was extended before the thirty-day period for circulation of the impact statement for public comment had expired; (2) the final statement and addendum

are unacceptable because both were improperly delegated to and represent the work product of the developer and his experts with little independent analysis or input from HUD and because the offer of commitment was not withdrawn pending completion of the additional environmental studies; (3) the supplemented final statement does not measure up to the requirements of NEPA; and (4) HUD's decision of commitment is arbitrary and capricious since it gave insufficient weight and consideration to environmental factors. In related contentions, plaintiffs assert that HUD's treatment of alternatives to the proposed project in the statement was deficient and that in accordance with the Urban Growth and New Community Development Act, HUD was obligated to consider and develop the suitability of alternative sites for the project.

To support their first issue—procedural irregularities at the agency vitiated HUD's offer of commitment—plaintiffs point to an October 1971 decision by the Community Development Board of Directors "to authorize an offer of commitment at the earliest appropriate time" and to a "draft" offer of commitment allegedly communicated from HUD to the developer on February 15, 1972, a date well before expiration of the thirty-day statement circulation period required by guidelines of the Environmental Protection Agency, 40 C.F.R. § 6.15 (1973), the Council on Environmental Quality, 40 C.F.R. § 1500.11(b), 38 Fed.Reg. 20556 (1973), and HUD regulations, HUD Handbook 1390.1(5.)(d.)(2), 38 Fed.Reg. 19187 (1973). Furthermore, plaintiffs argue that since the final statement, dated and filed with the Council on Environmental Quality on January 20, was not received until three days later, the February 23 offer of commitment also preceded expiration of the circulation period.

[6] The short answer is that the Council on Environmental Quality guidelines, although highly persuasive, do not govern compliance with NEPA. Sierra Club v. Callaway, *supra*; Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir.

1973). The draft HUD Title VII Regulations, which have never been formally adopted, were uppermost in the minds of the Community Development Board of Directors at their February 15 meeting when they authorized Assistant Secretary Jackson "to determine at the expiration of the thirty-day period whether an offer of commitment should be issued . . . ." More importantly, the record is clear that the February 23 offer of commitment followed the circulation of the impact statement to the Council on Environmental Quality and other public agencies and groups by more than the specified thirty days. Finally, that conditional offer was lawfully issued pursuant to 42 U.S.C. §§ 4513, 4514, and draft HUD regulations. Proposed HUD Reg. § 32.23, 36 Fed.Reg. 14212–13 (1971).

[7, 8] Neither is the commitment offer or the impact statement fatally undermined by the direct participation of the developer and his experts in the underlying environmental and other studies. There is no NEPA prohibition against a state agency, financially interested private contractor or a new community applicant providing the federal agency, which must of necessity work closely with these parties, data, information, reports, groundwork environmental studies or other assistance in the preparation of an environmental impact statement. *See* Iowa Citizens for Environmental Quality, Inc. v. Volpe, 487 F.2d 849 (8th Cir. 1973); Citizens Environmental Council v. Volpe, 484 F.2d 870 (10th Cir. 1973), cert. denied, —— U.S. ——, 94 S.Ct. 1935, 40 L.Ed.2d 286 (1974). NEPA demands only that "the applicable federal agency must bear the responsibility for the ultimate work product designed to satisfy the requirement of § 102(2)(C)." Life of the Land v. Brinegar, 485 F.2d 460, 467 (9th Cir. 1973), cert. denied, —— U.S. ——, 94 S.Ct. 1979, 40 L.Ed.2d 312 (1974). NEPA's commands, however, do not permit the responsible federal agency to abdicate its statutory duties by reflexively rubber stamping a statement prepared by others. The agency must independently perform its reviewing, analytical and judgmen-

tal functions and participate actively and significantly in the preparation and drafting process. *See* Greene County Planning Board v. F.P.C., 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849, 93 S.Ct. 56, 34 L.Ed.2d 90 (1972). HUD did no less here.

Non-degradation of the aquifer and ranch environment were paramount considerations throughout the entire HUD review of the Ranch application. To this end an inter-disciplinary team of New Communities Development staff members prepared and compiled each of the three environmental statements after independently reviewing data, information and comments provided by the developer's experts and other interested public agencies and groups. To obtain further verification, HUD retained a geologist and his staff of three associates to supervise and analyze the supplemental environmental studies and review every aspect of the project, especially the water quality monitoring program and the proposed environmental controls. His report and favorable conclusions were included with those studies in the addendum prepared by the New Communities Development staff.

[9–11] In the absence of bad faith or misplaced reliance, an agency faced with numerous applications for assistance and endowed with finite internal resources to implement congressional policy, cannot be expected to ignore useful and relevant information merely because it emanates from an applicant. This does not mean it may substitute the applicant's efforts and analysis for its own. The guidelines of the Council on Environmental Quality and the Environmental Protection Agency regulations regarding preparation of impact statements clearly contemplate submission of initial environmental information by the applicant to the agency. *See* EPA Reg., 40 C.F.R. § 6.21(c) (1973); CEQ Guidelines, 40 C.F.R. § 1500.7(c), 38 Fed.Reg. 20553 (1973); *see also* HUD Handbook 1390.1(5.), 38 Fed.Reg. 19184–87 (1973). In view of HUD's active participation and independent preparation of the impact statement and addendum, the district court did not

err when it failed to conclude that the agency improperly delegated its statutory responsibilities to the developer.

Whenever an agency decision to act precedes issuance of its impact statement, the danger arises that consideration of environmental factors will be *pro forma* and that the statement will represent a *post hoc* rationalization of that decision. NEPA was intended to incorporate environmental factors and variables into the decisional calculus at each stage of the process. "This means that draft statements on administrative actions should be prepared and circulated for comment prior to the first significant point of decision in the agency review process." CEQ Guidelines, 40 C.F.R. § 1500.7(a), 38 Fed.Reg. 20552 (1973). The impact statement is the central, independent component of NEPA's decision-making methodology since it "provides a basis for (a) an evaluation of the benefits of the proposed project in light of its environmental risks, and (b) comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action." Natural Resources Defense Council, Inc. v. Morton, 148 U.S.App.D.C. 5, 458 F.2d 827, 833 (1972).

[12, 13] In this case, HUD's draft statement preceded its first significant decision, the October 1971 authorization by the Community Development Board of Directors of an offer of commitment at the earliest appropriate time. However, that the draft and final statement were totally inadequate under NEPA is signaled by HUD's conditioning its offer on a comprehensive study of the recharge zone and on Community Development and Texas Water Quality Board approval of the measures to be instituted to protect the aquifer. The "final" impact statement itself acknowledged the lack of knowledge regarding the effect on the aquifer of storm water run-off, which it identified as the major pollution threat, and called for further investigation before, during and after construction of the Ranch. Because the district court's order holding this litigation in abeyance and the developer's agreement to Hud's call for a moratorium on construction effectively maintained

the status quo pending completion of the August addendum, it was not incumbent on the court below to require that HUD withdraw its commitment. The offer was contingent, stating that the Community Development Board "is under no obligation to enter into a project agreement or to guarantee your debt obligation until and unless" the Board has affirmatively found that each specified condition has been met. Post-submission efforts to rehabilitate the statement to comport with NEPA's provisions or to minimize adverse environmental consequences and maximize benefits should not be barred by initial inadequacies. The goal of NEPA is a better environment. While formally correct statements and technical compliance with the Act and complimentary guidelines are required, an initial finding of section 102 noncompliance must not irrevocably preclude eventual compliance. HUD's compliance with NEPA must be measured by the contents of the final impact statement as supplemented by the later addendum.

[14] As a further point in their multifaceted appellate offensive, plaintiffs contend that the supplemented statement did not comply with section 102(2)(C) because it failed (1) to examine the secondary or indirect environmental impacts from expected neighboring "parasite" developments; (2) to set out a cost-benefit analysis of the project; (3) to consider cumulative impacts; (4) to discuss adequately the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) to treat fully outside comments and opinions. A cursory examination of the impact statement, addendum and supporting documents demonstrates each of these assertions' lack of substance.

The supplemented statement pointed to statistics indicating continued explosive population growth in the northwest quadrant of Bexar County and the probabilities that the influx of unregulated, low density subdivisions would be accelerated by the expanded network of regional highways and that the

Ranch would tend to attract parasite settlements by as many as 40,000 persons along its outskirts. The statement also warned of the concomitant need for appropriate land use and zoning controls to protect the aquifer from accompanying septic tank discharge and other pollution and to insure that such developments were consistent with the plan, patterns and controls established for the Ranch. The developer promised to cooperate with the Alamo Area Council, the City of San Antonio and the Texas Water Quality Board in establishing the necessary regulatory controls. Moreover, in responding to the district court's order requiring the Edwards Water District and Texas Water Quality Board to file with the court semi-annual reports as to development over the aquifer, its effect and the environmental control measures being implemented, the Water Board indicated that it intended to incorporate virtually all of the HUD requirements imposed on the Ranch into an order regulating all development activities over the aquifer.

[15, 16] Similarly, exhibits in the addendum disclosed the expected cumulative impact of the Ranch on population distribution, land use patterns and the financial and economic resources of Bexar County and the surrounding areas. Unavoidable adverse environmental effects, irretrievable commitments of resources and other environmental costs and risks were identified and found not to outweigh the benefits of the Ranch in protecting and enhancing the Ranch site as well as avoiding the onset of urban sprawl. That the factors in this cost-benefit analysis are generally imprecise and unquantifiable does not render the result inadequately detailed. NEPA does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula. Land use regulation over the aquifer was seen to advance its long-run productivity as against the adverse short- and long-term effects of uncontrolled development. Advance planning, careful monitoring of water quality and stringent environmental controls should assure the continued in-

tegrity of the aquifer if such measures are extended throughout the recharge zone. Finally, all comments received as to each statement during the circulation period were attached included in the supporting documentation. Many of the responses to the draft statement and HUD's replies thereto are reflected in the two succeeding statements.

"NEPA requires that an agency must—to the *fullest* extent possible under its other statutory obligations—consider alternatives to its action which would reduce environmental damage." Calvert Cliffs' Coordinating Committee v. AEC, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1128 (1971). In its discussion of alternatives, HUD proposed (a) taking no action, (b) requiring actions of a substantially different nature that would provide similar benefits with varying environmental impacts and (c) approving a project of different size, scope or design with less significant environmental impacts. The no action alternative was unattractive since anticipated uncontrolled development over the recharge zone posed a greater threat to the aquifer. Just as adverse impacts could not be avoided by refusing financial assistance to the Ranch, neither could they be precluded by delaying the project 3 to 5 years until proposed but unenacted state or federal land use legislation might result in a comprehensive plan for the recharge zone. The second alternative encompassed approving the project on a site off the recharge zone. This proposal was discarded because it would produce the same adverse environmental results as no action and would not satisfy the demand for housing in the northwest quadrant of Bexar County. Approval of a project smaller in scope or of less costly design on the Ranch site under the third alternative would not provide the housing necessary to accommodate most of the area's potential residents. Neither would it incorporate the economies of planning and funding to be found in a larger project nor exert such a beneficial influence on the surrounding area.

Asserting that HUD's discussion of alternatives is conclusory, superficial and self-serving, plaintiffs contend that the

impact statement is fatally deficient because it fails to mention the acquisition of the recharge zone as a park or game preserve, the modification or elimination of federal assistance programs so as to discourage development over the recharge zone, the development of a different type or design of new community in another area of Bexar County, or any consideration or development of alternative sites for the project off environmentally sensitive areas. In a related contention, plaintiffs argue that Title VII, which is a guidepost for application of NEPA in this urban-suburban setting, compels HUD to consider alternative locations for new communities in evaluating an application for Title VII assistance.

[17, 18] It is true that the scope and extent of HUD's treatment of alternatives was less than exhaustive. Its sufficiency under NEPA, however, must be judged in light of the nature of the federal action and the underlying implementing federal legislation. The agency must consider appropriate alternatives which may be outside its jurisdiction or control, and not limit its attention to just those it can provide, *see* Natural Resources Defense Council, Inc. v. Morton, *supra*. Nevertheless, compliance with the NEPA command that an agency "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources," 42 U.S.C. § 4332(2)(D), must be judged against a rule of reason. "There is no need for an [impact statement] to consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative." Life of the Land v. Brinegar, *supra*, 485 F.2d at 472.

[19, 20] In this light the statement cannot be condemned for its failure to discuss either the acquisition of the recharge zone as a park at a prohibitive cost, or the elimination of all federal assistance to any development over the recharge zone. Furthermore, HUD's Title VII responsibility is limited to

approving or disapproving, in accordance with the statute's provisions, new community applications. Although the Act permits HUD upon specific authorization of the President "to plan and carry out large-scale projects" on federally owned lands to demonstrate the development of and serve as models for new communities, 42 U.S.C. § 4524, this statutory authority does not obligate the agency to search out a competing applicant willing to develop and finance a project on an alternate site or to work up a counter-proposal of its own before it can pass on the merits of a properly submitted new community application. "There can be no merit to plaintiff's claim that HUD cannot approve an otherwise eligible project merely because they have discovered vacant land in an area that they believe may be better suited for a new community than the existing site." Sierra Club v. Lynn, *supra*, 364 F.Supp. at 839.

[21] None of the alternative sites in Bexar County suggested by the plaintiff met all the eligibility requirements of Title VII. Absent a competing applicant, HUD's prerogatives ultimately consisted of accepting or rejecting the application before it. The impact statement explored the consequences of both courses of action. If HUD is to discharge fully its Title VII and NEPA duties, it must also review the available alternatives in planning, design and placement of a new community. The impact statement adequately discussed these aspects of the Ranch. When the statement is read with its supporting documentation, it furnishes sufficient information "to permit a reasoned choice of alternatives so far as environmental aspects are concerned." Natural Resources Defense Council, Inc. v. Morton, *supra*, 458 F.2d at 836. Since the statement was not deficient in approach and reflected a basis in good faith objectivity, we hold that it fully complied with NEPA.

[22] Finally, plaintiffs assert that the Secretary's substantive decision to approve federal assistance to the developers of

the Ranch gave insufficient weight to the environmental risks inherent in constructing a city of 88,000 persons over an area supplying water to more than 1,000,000 residents. The environmental studies indicated that domestic sewage, solid waste, accidental spills of dangerous liquids and storm water run-off posed the greatest threats to the integrity of the aquifer. The district court summarized well the pervasive measures required by HUD to protect the water quality of the underground reservoir. It suffices to refer the interested reader to that cogent exposition with the observation that the precautions taken clearly supported the court's determination of their adequacy. Sierra Club v. Lynn, *supra*, 364 F.Supp. at 843.

Should it be discovered that pollutants have escaped the surface controls and threaten the aquifer, the developer must take remedial action, including installing an impervious lining in drainage channels over the 161 acres of land identified as especially porous. Any remedial action is subject to HUD and Texas Water Quality Board approval. The project agreement makes it the developer's legally enforceable duty to comply with all present and future environmental quality standards. The developer has agreed to undertake measures to minimize soil erosion and control of sediment and water run-off during the construction phases. To effectuate its duty of quality control and inspection of public improvement construction projects, the developer in conjunction with the City of San Antonio, the Texas Water Quality Board and the Texas State Department of Health has agreed to create an environmental committee, an architectural review board and to employ an independent inspection agent, whose reports will be available to all public and other regulatory agencies. We view the efforts expended to protect the aquifer as substantial and apparently efficacious. The Secretary's decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

III.

Water Pollution Prevention and Control Act Amendments of 1972

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub.L. No. 92-500, 86 Stat. 816, 33 U.S.C. § 1251 et seq., in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To this end the administrator of the Environmental Protection Agency is directed, in cooperation with other federal, state and local agencies, to "prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve . . . the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes." 33 U.S.C. § 1252(a). The Act provides for federal and state enforcement of effluent limitations to be prescribed and of a discharge permit system. 32 U.S.C. § 1319. Unless in compliance with the provisions of the Act, "the discharge of any pollutants by any person shall be unlawful." 33 U.S.C. § 1311.

The district court concluded that plaintiffs had failed to state a claim under the Water Pollution Control Act because (1) this record does not reflect that the Environmental Protection Agency had established any water quality standards for the court to enforce, and (2) the scheme of environmental controls imposed should prevent any Ranch polluted water from reaching the aquifer. In this court, arguing from the dual premises that the Act establishes a federal policy of nondegradation of the Nation's surface and ground water supplies and that either the Ranch or the "parasite" developments it will attract in adjacent areas will inevitably result in the degradation of the aquifer, plaintiffs contend that HUD's loan commitment violates the duty imposed on the agency by

33 U.S.C. § 1368(c). This section provides in pertinent part that "[i]n order to implement the purposes and policies of this chapter to protect and enhance the quality of the Nation's water, the President shall . . . cause to be issued an order (1) requiring each Federal agency authorized to enter into contracts and each Federal agency which is empowered to extend Federal assistance by way of grant, loan, or contract to effectuate the purpose and policy of this chapter in such contracting or assistance activities. . . ." In Executive Order No. 11738, 38 Fed.Reg. 161 (1973), the President subsequently mandated that "each Federal agency empowered to extend Federal assistance by way of grant, loan or contract shall undertake such procurement and assistance activities in a manner that will result in effective enforcement of the Clean Air Act and the Federal Water Pollution Control Act. . . ."

[23] In the absence of evidence that the Ranch will pollute the aquifer and degrade established standards of water quality or that HUD's loan commitment contravened its duty to effectuate the Federal Water Pollution Control Act, we affirm the district court's determination that plaintiffs have failed to state a claim for violation of that Act. As the court below stated, the record is silent as to standards of water quality for the aquifer prescribed by the Environmental Protection Agency. It is undisputed that the developer must meet any state or federal water standards that may be established in the future. More importantly, the developer must act to prevent the Ranch from degrading the existing water quality in the aquifer. If the Ranch is discovered to be polluting the underground water supply, the developer has the legally enforceable duty to remedy the situation.

IV.

Attorneys' Fees

Convinced that this litigation, instituted by the plaintiffs as "private attorney generals," had advanced the public interest

by ensuring that adequate precautions would be taken to protect the aquifer and by effectuating important congressional policy, the district court awarded plaintiffs 20,000 dollars in attorneys' fees, costs and expenses. Only the developers were cast in judgment for this award since HUD and Secretary Lynn were immunized by statute. *See* 28 U.S.C. § 2412. Plaintiffs appeal from the award as inadequate. The developer cross-appeals from the award as improperly assessed against it. We reverse on the cross-appeal.

"The so-called 'American Rule' governing the award of attorneys' fees in the federal courts is that 'attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.' Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475 (1967)." F. D. Rich Co., Inc. v. United States, Industrial Lumber Co., Inc., — U.S. —, —, 94 S.Ct. 2157, 2163, 40 L.Ed.2d 703 (1974). Plaintiffs recognize that neither NEPA nor Title VII provide for the recovery of attorneys' fees. They had no contractual agreement with HUD or the developer concerning attorneys' fees.

The "American Rule" has not served, however, as an absolute bar to the shifting of attorneys' fees even in the absence of statute or contract. The federal judiciary has recognized several exceptions to the general principle that each party should bear the costs of its own legal representation. We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, or where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefitted class. The lower courts have also applied a rationale for fee shifting based on the premise that the expense of litigation may often be a formidable if not insurmountable obstacle to the private litigation necessary to enforce important public policies.

F. D. Rich Co., Inc. v. United States, Industrial Lumber Co., Inc., *supra*, —— U.S. at ——, 94 S.Ct. at 2165 (footnotes omitted).

The power to award attorneys' fees in the absence of statutory or contractual authorization is rooted in the inherent power of a federal court to do equity in the face of "overriding considerations." *See* Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). Clearly, no such considerations within the ambit of the first two exceptions to the American Rule exist in this case. It would be improper to punish the developer or HUD, either as unsuccessful litigants, or for bad faith, vexatious or obdurate conduct in their defense of the action. Inapplicable also is the "common fund" or "common benefit" exception, which is founded on the unjust enrichment rationale that the entire class benefited by a plaintiff's efforts should share the cost of litigation. It shifts to the beneficiaries those costs that they would have incurred had they brought and prosecuted the suit. *See* Hall v. Cole, *supra*; Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). None of the benefits of this litigation cited by the district court have inured, except in the abstract, to the developer. The common benefit rationale could justify an award against a public agency or private entity which would be able to shift the costs in common to the members of the public who draw their water from the Edwards Aquifer. Clearly, the developer is not in a position to distribute the costs of this litigation to the one million residents of the San Antonio area who will benefit from the preservation of this water source.

The present case is almost identical to The Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974), petition for cert. filed, 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed.2d 309 (1974). There the District of Columbia Circuit invoked the third exception to the American Rule to award attorneys' fees to plaintiff citizen groups who had acted as private attorney generals in litigation which, while not obtaining the ultimate

relief sought, did act as a catalyst to effect a change that served the public interest. The litigation had blocked construction of the Trans-Alaska Pipeline until Congress subsequently enacted specific legislation permitting construction. One-half of the plaintiffs' attorneys' fees were assessed against Alyeska Pipeline Service Co., the private applicant under the Mineral Leasing Act, despite the fact that it was the Interior Department which had violated the Act and failed to comply with NEPA. The court reasoned that since "Alyeska unquestionably was a major and real party at interest in this case, actively participating in the litigation along with the Government, we think it fair that it should bear part of the attorneys' fees." 495 F.2d at 1036 (citation omitted). The fees were arbitrarily halved and Alyeska was assessed one half. Since collection from the government was barred by statute, plaintiffs were required to absorb the other half. While Alyeska's participation in litigation that would have been finally adjudged improper but for congressional intervention might be cited as a distinguishing feature, the basic thrust of the majority position in the D. C. Circuit supports the action taken by the court below.

[24] We decline to follow *The Wilderness Society*. This circuit has never assessed attorneys' fees against a party innocent of any wrongdoing.[6] In the absence of proof that the private party controlled the government agency's actions or caused its default, it cannot be cast in judgment as a result of the agency's shortcomings. The fact that the breach of duty involved was committed by one who is immune from liability for financial redress affords no basis for a shifting of fees.

[25] It would be inequitable to assess attorneys' fees against the private developer in this case. Granting that plaintiffs performed a valuable public service in bringing this

6. Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); 493 F.2d 765 (5th Cir. 1974) and Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970), relied upon by the district court, are not to the contrary.

action which directly caused HUD's full compliance with NEPA on the Ranch project, it cannot be gainsaid that HUD was the only party that had breached a duty.[7] Congress directed the environmental obligations of NEPA against federal agencies alone. HUD was solely responsible for the initially deficient impact statement. The developer successfully defended this lawsuit. Its defense was not shown to have been unreasonable or to have unduly protracted this litigation. The district court was incorrect in proceeding from the premise that "attorneys' fees should be awarded unless the trial court can articulate specific reasons for a denial." 364 F.Supp. at 848.

The result of governmental immunity in this case is to require plaintiffs to absorb their own legal expenses. Another solution for future cases must come from Congress rather than in whole or half from the pocket of an innocent party.

V.

Retention of Jurisdiction

In entering judgment for the defendants, the district court retained jurisdiction over this action for the purpose of ensuring future compliance with the safeguards imposed on the Ranch's development; monitoring the development of areas adjacent to the Ranch and new measures which may be taken to protect the recharge zone; and acting as a central depository and public information source for all future written materials relating to compliance with HUD's requirements. The Texas Water Quality Board and the Edwards Underground Water District were ordered to file semi-annual reports on the extent and effect of development over the recharge zone and the measures instituted for protection of the aquifer, as well as the status of legislation, proposals and plans to protect remaining portions of the recharge zone outside Bexar Coun-

7. Because plaintiffs were unsuccessful in their other claims of statutory violations, only NEPA compliance is pertinent.

ty. 364 F.Supp. at 846. We find no constitutional basis to support this continued exercise of federal judicial power.

[26] Federal courts are empowered under Article III of the Constitution to rule only upon an actual "case or controversy." *See, e. g.*, Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937). With the rendition of a definitive judgment for defendants on the merits of each of plaintiffs' claims, affirmed by this court, the litigable aspects of the dispute are at an end unless further appellate proceedings are undertaken. The issues capable of judicial determination have been resolved; the rights and duties of the parties have been adjudicated.

[27, 28] The district court must abjure the role of a quasi-administrative agency for environmental affairs in Bexar and other affected counties. No evidence whatsoever indicates that HUD will fail to discharge faithfully its statutory functions. *See* SEC v. Medical Committee for Human Rights, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972). No analogy properly can be drawn here to civil rights or school cases in which the litigation proceeded against a background of a long history of purposefully unlawful conduct. *See, e. g.*, Alexander v. Holmes County Board of Education, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969) If any defendant should be asserted to be acting in breach of its duties under HUD's commitment or the law, the present plaintiffs or others who may be affected are free to file another action based upon such asserted malfeasance. Of course, the judgment and grant of relief disposing of the litigation, could have compelled the parties to file in a convenient local public office such reports as they may in the future make that contain material of public interest. The court may so modify its judgment upon remand.

[29] However, although "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case . . . ," United States v. Concentrated Export Assn., Inc., 393 U.S.

199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968), federal jurisdiction must be founded upon at least a "mere possibility [of recurrence] which serves to keep the case alive." United States v. W. T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). The record here discloses only the most speculative of possibilities that plaintiffs will find it necessary in the future to invoke judicial guidance of HUD's activities. As of today they can demonstrate no legal injury sufficient to present an actual case or controversy. *See* Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). There no longer remains any unadjudicated claim upon which relief can be granted. *See* Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973). "A hypothetical threat, based on speculative facts, is not enough to support the jurisdiction of a Federal Court." Alabama ex rel. Baxley v. Woody, 473 F.2d 10, 14 (5th Cir. 1973). In sum, we find on this record no jurisdiction to retain jurisdiction.

VI.

Conclusion

The judgment appealed from is affirmed except as to the award of attorneys' fees and the retention of jurisdiction. The cause is remanded for the entry of an order not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

APPENDIX B

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

November 19, 1974

TO ALL COUNSEL OF RECORD
Re: 73-3378 SIERRA CLUB, ET AL V. LYNN

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By Diane G. Lorent
Deputy Clerk

cc: Messrs. George P. Parker, Jr.
John C. Wood
Fred C. Meyers
Mr. Keith Burris
Mr. Bruce J. Terris
Mr. Phillip D. Hardberger
Messrs. Hugh P. Shovlin
William Session
Mr. Seagal V. Wheatley
Mr. M. Lynn Taylor
Mr. Jerry Hill

APPENDIX C

United States District Court,
W. D. Texas,
San Antonio Division.

Civ. A. No. SA72CA77.

SIERRA CLUB et al., Plaintiffs,

v.

JAMES T. LYNN, Secretary of Housing and Urban Development, et al., Defendants.

July 17, 1973.

On Motion for Reconsideration

Aug. 21, 1973.

OPINION AND ORDERS

SPEARS, Chief Judge.

Plaintiffs, four citizen groups (the Sierra Club, the Citizens for a Better Environment, the League of Women Voters of the San Antonio Area, and the American Association of University Women, San Antonio Branch) and their individual members, filed suit against James T. Lynn, Secretary of the United

States Department of Housing and Urban Development (HUD), and San Antonio Ranch, Ltd., alleging that the development of San Antonio Ranch New Town (SAR), a proposed Title VII new community to be located in northwest Bexar County, Texas, and partially financed by $18,000,000 in bonds guaranteed by the United States, would violate the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.A. § 4321 et seq., and the Urban Growth and New Community Development Act of 1970 (Title VII), 42 U.S.C.A. § 4501 et seq. Subsequently, the Edwards Underground Water District (EUWD) and Bexar County, Texas, intervened on behalf of the plaintiffs, and the Texas Water Quality Board (TWQB) intervened on behalf of the defendants. During the trial, EUWD amended its original complaint, alleging that the development of SAR also would violate the Water Pollution Prevention and Control Act of 1972 (Water Pollution Control Act), 33 U.S.C.A. § 1251 et seq.

The proposed site for SAR is located in the northwest quadrant of Bexar County, approximately 20 miles from downtown San Antonio, 10 miles from the South Texas Medical Center, and 6 miles from the University of Texas at San Antonio. SAR will cover 9,318 acres and have an ultimate population of 87,972 people living in 28,676 housing units. Development is to be staggered in 5-year phases over the next 30 years. When completed, the land-use will break down as follows: residential, 45% (25% of which will be low and moderate income housing); retail 2%; industrial 13%; open space 24%; technical center, 5%;

roads, 7%; schools, 4%. The site is presently in a virtually undisturbed natural condition. Fifteen percent of the acreage is basically flat with agriculturally productive soil; 85% is located in the Texas Hill Country, an area characterized by rocky soil with elevation differentials of from 100 to 200 feet.

At the outset, this Court feels that the parameters set out in its Order of January 23, 1973, with regard to the scope of review of the administrative decision in this case, bear reiteration; (1) This Court recognizes that it "is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971); (2) Limitation number one will not, however, prohibit this Court from making a "substantial inquiry," based upon "a thorough, probing, in-depth review" of the Secretary's decision. Id. at 415, 91 S.Ct. at 823. In other words, no matter what this Court may think of the decision of the Secretary on the merits, it is not empowered to overrule that decision unless the decision is found to have been made in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). In conducting this review, numerous pre-trial conferences were held, nine days of testimony, comprising 1,920 pages of transcript, were heard, and three environmental impact statements, as well as seven volumes of HUD's administrative record were reviewed.

As a result of the review process, this Court has already held its orders of January 23, 1973, March 7, 1973, and May 21, 1973, *inter alia,* that:

(1) Plaintiffs have standing to sue. See Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

(2) This Court has jurisdiction.

(3) The scope of review, pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), involves a determination of whether the decision by the Secretary of Housing and Urban Development was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(4) In reaching a decision as to whether or not the Secretary's decision was arbitrary, etc., the facts would be assembled in a hearing more nearly resembling a trial *de novo* than a substantial evidence proceeding, and the Court would make a "substantial inquiry" based upon a "thorough, probing, in-depth review" of the Secretary's actions. See *Overton Park,* supra; Allison v. Froehlke, 470 F.2d 1123 (5th Cir. 1972); Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972).

(5) All relief prayed for by the plaintiffs, except attorneys' fees, was denied.

The purpose of this Opinion is merely to recite the facts supporting the Court's conclusions previously entered and, where appropriate, to expand the reasoning behind those conclusions. Nothing stated herein is to be construed as in any way modifying this Court's past actions.

I Applicability of Title VII to SAR

A reading of the legislative history of Title VII reveals that Congress was attempting therein to treat the multi-faceted problem of urban development known as "urban sprawl." It indicates that Title VII "would provide for the development of a national urban growth policy to encourage and support the more rational and orderly growth of the Nation's communities." U.S.Code Cong. and Adm.News, 91st Cong., 2d Sess., at 5582, 5586 (1970). In attempting to reach this goal, Congress recognized a need to encourage the building of new communities by helping the private sector overcome the traditional barriers to a new community development, i. e., the problems of raising a large initial investment which would yield a delayed, irregular cash return; of assembling suitable sites of sufficient size; and in coordinating site and related improvements among all involved public and private sectors. Id. at 5587. The assistance provided by the Government, and administered by the Community Development Corporation, is in the form of a guarantee that the bondholders will receive a return of their investment in the event of default by the developer.

Congress set out the eligibility requirements for a new community loan guarantee in 42 U.S.C.A. § 4513. In determining that SAR was eligible for such assistance, HUD spent two and one-half years, from February, 1970, until November, 1972, reviewing the project plans. A review of the testimony of Anthony P. DeVito, chief of physical and social planning for the Office of New Community Development (NCD),

reveals that the following process, in skeletal form, occurred over the two and one-half years. A confidential meeting, exploratory in nature, between the developer and members of NCD, was held on February 20, 1970. The developer then prepared a "preapplication proposal" which generally outlined the project and its major problems, and submitted it to NCD on March 16, 1970. Subsequently, having received an invitation to make formal application, the developer formalized a final land, social and community plan which he submitted to NCD, along with $10,000, on November 12, 1970. From then until August, 1971, a full review was undertaken by NCD, in which the opinions of many local governmental agencies were sought. Three Environmental Impact Statements were later issued (September 13, 1971; January 20, 1972; and August 24, 1972), and the offer of commitment was made on February 23, 1972, the date this suit was commenced.

After reviewing all of the evidence, HUD concluded that SAR was eligible for new communities assistance, because, pursuant to § 4513(a)(1), it would provide "an alternative to disorderly urban growth, helping preserve or enhance desirable aspects of the natural and urban environment." HUD considered the fact that the northwest quadrant of Bexar County was growing at a rapid rate, and would continue to so grow; especially given the proximity of the University of Texas at San Antonio, and the South Texas Medical Center. In addition, it was found that the

Alamo Area Council of Governments (a sixteen-member, multi-governmental agency), the Water Board of the City of San Antonio, the City of San Antonio Public Service Board, the Texas Water Quality Board, the Governor's office, and the Northside Independent School District had reviewed the project and decided that SAR was consistent with the comprehensive regional plan. Finally, the undisputed evidence reflected that neither governmental controls over land use nor comprehensive and cohesive water resource management plans then existed in this area of Bexar County. This last finding was indeed significant, for as a result of the lack of planning, disorderly growth would probably continue to accelerate at a rapid rate for at least the next decade.

Plaintiffs complain bitterly that SAR is ineligible for Title VII assistance because HUD did not adequately consider alternative sites (this argument is separate and distinct from the similar allegation that, under NEPA, alternatives must be discussed in the Environmental Impact Statement). This Court finds nothing in Title VII, nor in its legislative history, that requires HUD to seek out alternative developers or large tracts of land for possible new community development. Title VII requires HUD to approve or disapprove applicants for assistance pursuant to 42 U.S.C.A. § 4513, and it cannot approve a new community which it determines falls outside the guidelines established by Congress. There can be no merit to the plaintiffs' claim that HUD cannot approve an other-

wise eligible project merely because they have discovered vacant land in an area that they believe may be better suited for a new community than the existing site. In addition, insofar as this litigation is concerned, plaintiffs have failed to show that there are any alternative sites that would meet all the other eligibility requirements of Title VII in the San Antonio area.

Pursuant to the above, this Court holds that HUD made neither an arbitrary nor capricious decision, nor one that constituted an abuse of discretion, nor one that otherwise was not in accordance with law, when it found, with respect to SAR that:

(1) The project will provide an alternative to disorderly urban growth;

(2) It will be economically feasible, in that it will capture more than 15% of the projected growth of Bexar County, because of its wide range of housing amenities and the superior environment;

(3) It will contribute to the welfare of the entire area, as existing septic tanks will be replaced with storm and sanitary sewers, and as industrial and commercial facilities will be placed in a setting encompassing a broad price range of housing;

(4) It is consistent with comprehensive physical and social planning;

(5) It has received all governmental reviews and approvals required by State or local law;

(6) It will contribute to desirable living conditions in the community, and will be characterized by well balanced and diversified land use patterns, and will include or be served by adequate public, community, and commercial facilities;

(7) It makes substantial provision for housing within the means of persons of low and moderate income;

(8) It will make significant use of advances in design and technology with respect to land utilization, materials and methods of construction, and the provision of community facilities and services; and

(9) A basis of financial, technical, and administrative ability which demonstrates capacity to carry out the program with reasonable assurance of its completion has been shown.

In conclusion, it should be noted that, as SAR represents the only community with land-use controls within the recharge zone of the Edwards Underground Reservoir, the vital source of water for the City of San Antonio, it represents an extremely vital vehicle to capture and control growth in a very sensitive geological area. The project will prove to be an alternative to the uncontrolled urban sprawl that will most probably emanate from the University of Texas at San Antonio and its environs if SAR is prohibited from being completed. Hopefully, the project may serve as a model for future urban development in the San Antonio area.

II Applicability of NEPA to SAR

There is no doubt that HUD's action in approving the SAR project comes within the ambit of "major federal actions significantly affecting the quality of the human environment," 42 U.S.C.A. § 4332(C), thereby subjecting such action to the requirements of NEPA. HUD has made a loan guarantee of $18,000,000 for a new community proposed to be located on a portion of the recharge zone of the Edwards Aquifer, an underground water supply constituting the sole supply of water for the City of San Antonio. It is the plaintiffs' contention that, due to the potential hazard of polluting this water supply, a worse site for a Title VII new community in the San Antonio area could not have been chosen.

To better understand the nature of the lawsuit, a brief description of the geology in the area is required. The independent geologist employed by HUD to study the environmental impacts of SAR described the aquifer as follows:

> The term "Edwards Aquifer" has been used . . . to designate a section of Lower Cretaceous rocks from which moderate to high quantities of ground water have been produced in the past. Nearly all the earlier reports mention it as Edwards and Associated Limestones. [Dr. Sergio] Garza (1966) states [that it] "—includes Georgetown, Edwards, and Commanche Peake limestones." The Edwards Aquifer is the principal source of ground water from Bracketville, Texas, on the west, [through San Antonio and New Braunfels,] to San Marcos, Texas, on the east.

The aquifer region covers about 3.5 million acres, with a width of from 5 to 45 miles and a length of approximately 175 miles.

Ground water is found under two sets of conditions within the aquifer, depending upon which side of the Balcones Fault Zone it is located. Northwest of the fault, the "upthrown" side, where the limestone is honeycombed with many vertical and horizontal cracks, ground water occurs under normal, unconfined ground-water table conditions. Southeast of the fault line, the "downthrown" side, the water is located in an underground reservoir; i. e., the water occurs under confined or artesian conditions. As a result of the vertical fault, the rocks on the southeast side of the fault zone were down-dropped and the Edwards Aquifer is found overlain by rocks of younger age and of lower permeability, causing the confining condition.

The fault zone crosses the SAR site, at what is known as the Haby Crossing Fault, in basically an east-west direction, leaving approximately 7000 acres to the north and 2000 acres to the south. The ground-water conditions on SAR are no different than those described for the rest of the aquifer.

It is estimated that the artesian section of the aquifer (i. e., the reservoir from which San Antonio draws its water) has an average annual recharge of about 500,000 acre feet. Three sources of this recharge are generally recognized. The first, and least signficant, is the recharge from rain falling directly on the exposed limestone (i. e., the "outcrop" area)

in the upthrown region. Rain falling on the outcrop seeps down through the honeycombed passages in the limestone, and eventually filters its way into the reservoir. The second source, from which a majority of the recharge takes place, occurs where surface streams transverse the Balcones Fault Zone, and the water enters the aquifer through fractures (i. e., either faults or joints). There are 14 of these major stream beds that flow across the fault zone, none of which is found on the SAR site. The third form of recharge is the underflow in the reservoir from one area to another. The flow of water on the downthrown side is southerly, while the ground-water movement on the upthrown side is principally from west to east.

With the passage of NEPA, a national policy was established to encourage productive and enjoyable harmony between man and his environment. 42 U.S.C.A. § 4321. Suits brought to enforce this policy are usually three-tiered, and based upon the language found in 42 U.S.C.A. § 4332(C). The first two issues present ordinary questions of law, while the last presents a question of fact reviewable pursuant to the Administrative Procedure Act. First, there is the threshold determination of whether or not it is necessary to file an Environmental Impact Statement. See Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973). As there have been three Environmental Impact Statements filed in this case, the question need not be explored by this Court. The second issue presents a check list, i. e., whether all the components required by 42 U.S.C. § 4332(C)(i)-(v) have been included

within the Environmental Impact Statement. Finally, having determined that a sufficient statement has been filed, was the determination by the federal agency to proceed with the project arbitrary, etc?

(A) *Is There A Sufficient Environmental Impact Statement?*

The evidence shows that upon learning the proposed SAR site was above the aquifer, HUD took steps to insure that the quality of the water would be protected. The developer was required to retain a geologist to review the project. As comments from the Draft Environmental Impact Statement were returned to HUD, it became apparent that many people were concerned over the possible adverse environmental aspects of the project. The Water Quality Advisory Review Board, composed of 18 public agencies who volunteered to review the water aspects of the project, was established, and functioned from April 24, 1972, until June 23, 1972, by holding four separate public meetings. The comments of these 18 agencies were forwarded to HUD for consideration. HUD required the developer to again have the Texas Water Quality Board review the project, and on June 28, 1972, that agency gave its approval. In addition, as indicated, HUD retained its own independent geologist to review the project independently, and he approved the project.

HUD also secured comments upon the three Environmental Impact Statements, as required by 42 U.S.C.A. § 4332. Comments by 13 public agencies

were sought on the Draft Environmental Impact Statement of September 13, 1971. Of those agencies, 7 filed written comments with HUD. In addition, 9 other public agencies and citizen groups volunteered comments upon the Statement. These comments were reviewed and attached to the Final Environmental Impact Statement of January 20, 1972, which was circulated for review among the 16 organizations which commented on the Draft Statement. Finally, the Addendum to the Final Environmental Impact Statement of August 24, 1972, was circulated among 38 public agencies and groups for comment.

Five areas of concern which must be adequately covered in the Environmental Impact Statement are delineated in NEPA, 42 U.S.C.A. § 4332(C)(i)-(v). These five areas are covered adequately in the Addendum of August 24, 1972.

First, there is an analysis of the environmental impact of HUD's proposed action. As recognized in the statement, the project will result in the conversion 9,318 acres of virgin land to a planned new community which provides housing, community facilities, employment centers, and other amenities. By careful planning, damage to the environment will be minimal. There is a discussion of the natural characteristics of the SAR location, including an analysis of the soils, proposed storm drainage facilities, existing topography and vegetation, the climate, the wildlife and plants unique to the area and plans to preserve them, archeological sites in the project area, and SAR's water supply.

Second, the adverse environmental effects which cannot be avoided are recognized. As stated above, since the site is presently in a natural state, construction will inevitably change some of the site's current elements. Paving will increase the runoff of diffused surface water, thereby reducing retained soil moisture. On the site there will be an increase in noise levels, the number of automobiles, thermal emissions, and the amount of wastes to be disposed. Also, there is the possibility that the development of SAR may affect surrounding areas, by attracting construction on adjacent property.

Third, the alternatives to the proposed action are discussed. These include taking no action, the selection of an alternative site, and the use of the same site for a new community with a different design.

Fourth, the relationship between short-term uses of the environment, and the maintenance and enhancement of long-term productivity are discussed.

Fifth, the irreversible and irretrievable commitments of resources as a result of the project are designated.

In the opinion of this Court, the Environmental Impact Statement, though possibly not completely exhaustive in every respect, is sufficient to permit a reasoned decision as to the environmental effects of SAR. This is especially true if one reads the 67 exhibits, consisting of *inter alia,* maps, letters and reports, which comprise appendices A and B. Thus, the Environmental Impact Statement will serve the purpose

for which it was required. As it was compiled by NCD, it shows that that agency gave thought to the environmental factors involved in this project. The Statement also meets the requirment of being a full disclosure of the environmental facts. See Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972). In addition, it "represents an accessible means for opening up the agency decision-making process and subjecting it to critical evaluation by those outside the agency, including the public." Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 351 (8th Cir. 1972). Therefore, this Court holds that the Addendum to the Final Environmental Impact Statement, issued August 24, 1972, meets all the requirements for the "detailed statement" required by NEPA, 42 U.S.C.A. § 4332(C).

(B) *Was the decision of the Secretary in violation of the Administrative Procedure Act?*

Having decided that the Environmental Impact Statement meets the requirements of NEPA, the Court must answer the question of whether or not the decision by the Secretary of HUD was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). It is the position of the plaintiffs that the decision was arbitrary, etc., because the Secretary "has taken and is in the process of taking actions . . . which violate the National Environmental Policy Act by failing to protect the Edwards Underground Water Reservoir and thereby the water supply of San Antonio from the risk, and indeed likelihood, of pollution. . . ."

The studies conducted by HUD, as well as those conducted by the developer, reveal that the proposed site for SAR does not lie upon any major recharge point for the Edwards Aquifer. In fact, most estimates place the recharge occurring from the SAR property at 0.5% of the total annual 500,000 acre feet of recharge to the entire aquifer. The highest estimate this Court has heard was 1.0%. Only 13% of annual rainfall on the SAR site ever reaches the aquifer. The other 87% is either consumed by vegetation, evaporated directly, or removed from the site as surface run-off. Notwithstanding such minimal recharge from the site, however, HUD has still seen fit to require that an elaborate water control and monitoring system be established by the developer. To design this system, detailed studies were made and independently reviewed to determine the present contents of the water in the aquifer. Then, an appropriate urban area was studied in order to better anticipate the quality of the urban water run-off after the completion of SAR. Finally, scientific projections were made to determine the effects of such urban run-off on the aquifer.

After the studies were completed, a complete system of control and monitoring was established, not only to maintain present water quality, but also to effectively monitor future water quality, so that corrective measures could be taken were it discovered that some pollution was seeping into the reservoir. Extensive measures have been set up to retard any pollution from seeping below the surface. First, there will be an extensive street sweeping program. It was esti-

mated at the trial that through the use of modern vacuum sweepers approximately 90% of the contaminants which accumulate on the streets could be removed by this process, and that this reduction should make the urban street run-off comparable to the storm water run-off occurring on the site today. In addition to the street sweeping, six inches of top soil will be required to be spread on all lawns in SAR. This soil should serve to "leech out" approximately 99% of the pesticides and herbicides which will be used at SAR, especially since the deed restrictions will require that a urea-type fertilizer shall be the only type of fertilizer allowed on SAR. All solid wastes will be collected and removed from the recharge zone. There will also be regulations requiring the use of double tanks for any storage of petroleum products in the area, and the sewer pipes utilized will be of a very high quality, and unlike most anywhere else in the United States, be inspected for leaks after two years, and then again after five. Within the sensitive recharge area, no leakage will be permitted, as the pipe will be laid inside another concrete pipe. Outside the recharge area there will be a maximum test leakage rate allowable of 250 gallons per inch diameter per mile per day, which is to be contrasted with a 500 gallon leakage rate that was originally recommended by the Texas Board of Health. Although it is not contemplated that the pipes will ever leak at the allowable rate, as the rate is determined under pressurized conditions and the system to be employed at SAR will be based upon gravitational pull, it should be noted that, even were the maximum leakage rate occurring (i. e., 200,000 gallons per

day) it would only be equivalent to the waste produced by the 400 cattle currently grazing on the SAR site.

To insure that the controls are working the developer will employ an elaborate water monitoring system. There will be a surface water monitoring system consisting of five permanent monitoring stations, two or three 'grab sample" points, and two or three lawn sampling points. From this initial gathering, the quantity and quality of surface water will be determined as it is entering the limestone. The second level of water monitoring will consist of nine wells strategically placed on the upthrown side of the SAR site. The sampling of this well water will determine whether or not pollutants are getting by the initial controls. Finally, there will be three wells located just south of the Haby Crossing Fault which, due to their large draw-down cones, should sample most of the water entering the artesian section of the aquifer from SAR. This water monitoring system has been approved by the city engineer of San Antonio, the Texas Water Quality Board, the State Health Department, and the geologist retained by HUD.

Through the enforcement of the above mentioned controls, this Court finds that HUD has complied with the goal of NEPA, as stated in 42 U.S.C.A. § 4331, by "[using] all practicable means, consistent with other essential considerations of national policy" to carry out our nation's environmental policy. It surely cannot be said, in light of the above, that the Secretary's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

III. Applicability of the Water Pollution Act

On the seventh day of trial, Plaintiff-Intervenor Edwards Underground Water District (EUWD) was granted leave to file a trial amendment which added as a cause of action the alleged violation by SAR of the Water Pollution Prevention and Control Act Amendments of 1972, 33 U.S.C.A. § 1251, et seq. In general, the amendment claims that the development of SAR will cause the pollution of navigable surface waters, as well as ground waters in the Edwards Reservoir. Although there has been no evidence introduced as to the presence of any navigable waters in the area of SAR, there is ground water at the site; therefore, EUWD's complaint must be considered. For the reasons that follow, this Court finds absolutely no merit to the claim that the development of SAR will violate any provision of the Water Pollution Control Act.

The purpose of the Act, as indicated by the legislative history, U.S.Code Cong. and Adm.News, 92d Cong., 2d Sess. at 3668-3834 (1972), is to establish the means whereby comprehensive programs for water pollution control may be developed and implemented by the Environmental Protection Agency. As stated in the history, Id. at 3758.

> The major purpose of this legislation is to establish a comprehensive long-range policy for the elimination of water pollution, making it clear to industry and municipalities alike the pollution control performance which will be expected over the next decade. At the same time, the bill provides a mechanism for generating sound; detailed

> information on the costs which will be associated with the later stages of the control program, and allow subsequent Congresses to evaluate the success of the policy enunciated in this bill.

Under the bill, standards may be established for the maximum level of pollution allowable in interstate waters, and once the standards are set up, legal action may be taken to enforce them against the polluters. Id. at 3671. As no evidence was introduced at this trial indicating what standards, if any, have been established by the Environmental Protection Agency, this Court has nothing to enforce. It should be noted, however, that when the standards have been determined, they will be applicable to SAR, as HUD has required the developer to conform to *any* state or federal water standards which may be established.

If, however, this Court is mistaken in its conclusion that the Act is not presently applicable to SAR, it finds that the development will not discharge toxic pollutants in toxic amounts into the aquifer. One-half of one per cent is the recharge which may be attributable to the SAR site. Through the scheme of controls, none of the water reaching the aquifer region should be polluted. If, however, it is polluted, then the monitoring system which has been established should discover it, and afford ample opportunity to correct it. HUD has required the developer to maintain the *present* water quality in the aquifer. Thus, if the montoring system discovers that pollution is seeping into the aquifer, it will be the duty of HUD to see to it that the seepage is stopped. This Court fails to

see how any act of Congress could improve upon the standards already established by HUD for the protection of the aquifer.

Conclusion

After hearing nine days of testimony and reviewing a stack of documents almost four feet high, this Court is of the firm belief that the development of the San Antonio Ranch new community should not be hindered as long as the controls which have been imposed by HUD are maintained. It is significant that the exacting restrictions placed upon SAR in this case constitute the only meaningful attempt thus far, on the part of *any* governmental agency, to control the use of land over the recharge zone of the Edwards Aquifer. Ideally, of course, it would be much more desirable if all residential and commercial development were prohibited over the entire recharge area, and the land converted into a closely supervised park or wildlife preserve. But unfortunately, there is a serious question whether adequate enabling legislation exists to authorize any governmental agency to effect the remedies needed to accomplish anything of a constructive nature in that regard. If the public could be assured that the remainder of the recharge zone in the northwest section of Bexar County, including that portion to be occupied by the University of Texas at San Antonio and its environs, would be subjected to controls similar to those governing San Antonio Ranch, there would be little or no occasion for the deep concern expressed by this Court during the trial, and shared

by others, for the future purity of the aquifer. Actually, however, as already stated, the portion of the recharge area occupied by San Antonio Ranch constitutes only one-half of one percent to one percent of the total Edwards recharge zone. Unless something is done—and soon—by some responsible agency or agencies to eliminate the pollution in Medina Lake and the various streams presently flowing through the fourteen highly sensitive areas of recharge, it stands to reason that the Edwards Aquifer is doomed, regardless of what happens in the recharge area of San Antonio Ranch. The time for action, rather than words, has long since passed.

Although this lawsuit primarily involved only the portion of the recharge zone to be occupied by San Antonio Ranch, the fact remains that the future of the whole Edwards Underground Reservoir could be at stake, unless adequate controls are instituted for the entire recharge area. Under the circumstances, this Court believes, as have courts in other areas of the law, see, e. g., United States v. Hinds County School Board, 433 F.2d 611, 618-619 (5th Cir. 1970), that it should retain jurisdiction of this cause for such period of time as may be necessary to insure that the safeguards imposed upon the San Antonio Ranch developers by HUD are fully instituted and implemented; that the monitoring procedures adopted are followed meticulously; and that the reports reflecting the status and results of all procedures being utilized are made a matter of public record, as and when they are available. By the same token, and so that any

urban sprawl attributable to the development of SAR in adjacent areas may be readily recognized and evaluated, this Court should be kept advised by the Texas Water Quality Board and the Edwards Underground Water District, on a continuing basis, of the status of any development taking place in the portion of the Edwards Aquifer recharge zone located in Bexar County, including, but not limited to, the San Antonio Ranch and the University of Texas at San Antonio, as well as the immediate and long-range effect of such development upon the recharge zone and the underground reservoir, indicating what measures, if any, are being instituted for the protection of the aquifer, and reflecting the status of any legislation, plans or proposals designed to protect the remaining portions of the recharge zone lying outside Bexar County, Texas.

Accordingly, it is Ordered that:

1. Judgment be entered in favor of defendants, HUD and SAN ANTONIO RANCH, LTD.
2. All relief prayed for by plaintiffs and plaintiff-intervenors be and is hereby denied. (See paragraph 5, infra.)
3. The defendant, SAN ANTONIO RANCH, LTD., shall file with this Court, the Texas Water Quality Board, the Edwards Underground Water District, the City of San Antonio, and Bexar County copies of all data and reports required to be supplied to HUD pursuant to the General Development Plan and the project agreement between San Antonio Ranch, Ltd.

and HUD; and HUD shall, in turn, file with the Court, the Texas Water Quality Board, the Edwards Underground Water District, the City of San Antonio, and Bexar County copies of all comments thereon and responses thereto, including any and all suggestions, recommendations, and ultimatums that may be furnished to the developer by HUD.

It is further Ordered that, subject to the further orders of this Court, the Texas Water Quality Board and the Edwards Underground Water District, both of whom are parties to this lawsuit, shall, on or before July 1, 1973, and at intervals of not more than six months thereafter, file with this Court, as well as with the City of San Antonio and Bexar County reports reflecting the status of any development taking place in the portion of the Edwards Aquifer recharge zone located in Bexar County, including, but not limited to, the San Antonio Ranch and the University of Texas at San Antonio, as well as the immediate and long-range effect of such development upon the recharge zone and the underground reservoir, indicating what control measures, if any, are being instituted for the protection of the aquifer, and reflecting the status of any legislation, plans, or proposals designed to protect the remaining portions of the recharge zone lying outside Bexar County, Texas.

MOTION TO AMEND JUDGMENT

Consideration has been given to the motion of James T. Lynn, Secretary of Housing and Urban Development, to alter or amend judgment, in which he com-

plains of this Court's action in retaining jurisdiction over this suit and requiring HUD to file copies of comments and responses relating to the filings made by San Antonio Ranch, Ltd. This Court, however, feeling that full compliance with the National Environmental Policy Act of 1969, 42 U.S.C.A. § 4321, is of vital importance to the citizens of this area, and believing that it has full authority to retain jurisdiction for the purposes indicated, is of the opinion that the motion should be denied. See Alexander v. Holmes County Bd. of Ed., 396 U.S. 19, 21, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969); United States v. Hinds County School Bd., 433 F.2d 611, 618-619 (5th Cir. 1970); Holland v. Bd. of Public Instruction, 465 F.2d 370. (5th Cir. 1972).

It is patently obvious that great inconvenience and extreme hardship would be imposed upon the public generally, and upon the agencies involved in this suit, if they were required to individually obtain from HUD the many proposed studies alluded to in the General Development Plan and the Project Agreement, in order to assure themselves that the developer was indeed living up to what it promised to do. As a consequence, it is highly appropriate for this Court to act as a central depository to receive all pertinent material available with respect to any development in the recharge zone of the Edwards Aquifer. In this connection, it is gratifying to note that the developer, San Antonio Ranch, Ltd., as well as the Texas Water Quality Board and the Edwards Underground Water District, have indicated their willingness to comply

with the Court's requirements. Since federal funds are involved, and HUD is a public agency that has voluntarily assumed the obligation to make certain that San Antonio Ranch, Ltd. develops its property over the recharge zone pursuant to law, it should be willing to do no less.

The motion to alter or amend judgment is, in all things, denied.

ORDER GRANTING ATTORNEYS' FEES

This Court has considered the citizen plaintiffs' brief in Support of Attorneys' Fees filed pursuant to this Court's prior Judgment and Order, wherein it was stated,

> This Court is firmly convinced that even though the plaintiffs may have, at this stage, technically lost this lawsuit, nevertheless, a very important service has been performed in creating a greater public awareness of the dangers of pollution threatening this very valuable natural resourse [*i. e.*, the Edwards Underground Reservoir]. Therefore, if it is appropriate under the law to award attorneys' fees to certain of counsel for plaintiffs in order to compensate them for their services rendered herein, consideration will be given to doing so. Each attorney for plaintiffs is directed to furnish to this Court and opposing counsel, within ten days from this date, a brief setting forth his position in this regard . . . . Defendants shall have ten days thereafter in which to respond.

Having reviewed the facts of this case and the briefs filed, as well as the authorities cited therein, this

Court is now of the belief that attorneys' fees should be awarded to counsel for the citizen plaintiffs and paid by the defendant San Antonio Ranch, Ltd.

Defendant San Antonio Ranch, Ltd. (SAR) argues strenuously that "it is highly questionable whether this Court has the power to impose upon a prevailing adverse party the burden of reimbursing plaintiffs' attorneys' fees . . .". It is SAR's position that, unless the award is provided for by either statute or contract, or unless the circumstances of the case indicate the presence of one of the three "well established exceptions to the American rule" of generally denying attorneys' fees, the award may not be made. This Court is in disagreement with such a hard-and-fast approach.

The three exceptions to the general rule that attorneys' fees are not ordinarily recoverable have been stated recently in La Raza Unida v. Volpe, 57 F. R.D. 94, 96 (N.D.Cal.1972). The first is the "obdurate behaviour" situation wherein the plaintiff is awarded fees because the defendant has been acting in bad faith. See Vaughan v. Atkinson, 369 U.S. 527, 530-531, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962). The second general exception is the "common fund" situation which ensures that all beneficiaries to the litigation share in its expense. See Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). Finally, there is the "private attorneys general" situation under which plaintiffs are compensated for ensuring the effectuation of a strong Congressional policy. See Lee v. Southern Home Sites Corp., 429

F.2d 290 (5th Cir. 1970). However, this Court does not believe that a slight deviation from one of the established elements of any of the exceptions would, *ipso facto,* deprive the plaintiffs of an award should the trial court decide that equity dictates the award. The Supreme Court appears to be in complete agreement with this reasoning. As Mr. Justice Brennan recently stated for the Court in Hall v. Cole, 412 U.S. 4-5, 93 S.Ct. 1943, 1945, 36 L.Ed.2d 702 (1973).

> Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation," Sprague v. Ticonic National Bank, 307 U.S. 161, 166 [59 S.Ct. 777, 83 L.Ed. 1184] (1939), and federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such a recovery." Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-392 [90 S.Ct. 616, 24 L.Ed.2d 593] (1970); see Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 [87 S.Ct. 1404, 18 L.Ed.2d 475] (1967).

After reviewing the facts here, this Court is of the belief that the position of the citizen plaintiffs is analogous to that of a plaintiff in a civil rights suit, wherein it has been concluded that attorneys' fees should be awarded unless the trial court can articulate specific reasons for a denial. See Cooper v. Allen, 467

F.2d 836, 841 (5th Cir. 1972); Lee v. Southern Home Sites Corp., 429 F.2d 290, 295 (5th Cir. 1970). In *Lee,* Judge Coleman stated,

> There is ample authority, outside the civil rights area, to support the proposition that the allowance of attorneys' fees and expenses of preparation for trial is in the discretion of the district court *sitting in equity* where exceptional circumstances call for their allowance in order to do justice between the parties, . . . as well as in the more traditional situations where the allowance of attorneys' fees is provided for by statute or contract. . . . In the area of civil rights, many cases have either allowed or implicitly recognized the discretionary power of a district judge to award attorneys' fees in a proper case in the absence of express statutory provision . . . and especially so when one considers that much of the elimination of unlawful racial discrimination necessarily devolves upon private litigants and their attorneys, . . . and the general problems of representation in civil rights cases.

429 F.2d at 295 [citations omitted].

As in the civil rights area, the burden of assuring full compliance with the national environmental policy, as expressed by Congress through theNational Environmental Policy Act of 1969, 42 U.S.C.A. § 4321 et seq., has fallen upon concerned citizens. The mere fact that there is no provision in the statute for the awarding of attorneys' fees will not be viewed as a bar to such an award. See Mills v. Electric Auto-Lite Co., 396 U.S. 375, 390-391, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970).

In this case, not only can no specific and justifiable reasons be articulated for the denial of attorneys' fees, but this Court is of the firm belief that equity dictates the award. At the commencement of this suit on February 23, 1972, comparatively little of the information subsequently made public had been made available to the general citizenry. Although the "Final Environmental Statement" was circulated for public comment on January 20, 1972, and HUD's offer of commitment was made on February 23, 1972 (the same day suit was filed), this Court, in its Order To Hold Case In Abeyance of March 14, 1972, saw fit to state as point No. 7,

> In view of the fact that defendants agree that the existing 'Final Environmental Impact Statement" is not in truth and in fact a "final" statement as contemplated by law, and that additional information required by law needs to be furnished, there is no necessity for this Court to order that the existing statement be withdrawn, but only to require that any environmental impact statement ultimately relied upon satisfies the requirement of finality as used in the legal sense.

Over the months that followed, many studies and hearings were conducted which inquired into the feasibility of the SAR Project, and what, if any, adverse effects it might have upon the Edwards Underground Reservoir. It was during this period that Dr. Henry V. Beck's "Evaluation of Water Quality Studies on San Antonio Ranch, New Town," a report relied upon heavily by the defendants, was

published, and the studies on storm water runoff conducted by Dr. W. H. Espey, Jr. were performed. In addition, the four meetings of the San Antonio Ranch Water Quality Advisory Review Board were held during the summer of 1972. In light of the reams of material published after this Court's Order of March 14th, it is difficult to conclude that the filing of the suit did not help to ensure that adequate precautions would be taken to protect South Texas' very valuable water resource and that the measures taken would be made available to the scrutiny of the public eye.

Finally, although this Court would like to spread the cost of the award equally between San Antonio Ranch, Ltd., and HUD, it finds that by Congressional mandate it is prohibited from doing so. See 28 U.S. C.A. § 2412.

It is therefore hereby ordered that the citizen plaintiffs recover reasonable attorneys' fees from the defendant San Antonio Ranch, Ltd., the amount of such award to be determined at a hearing to be held on a date to be set after conferring with counsel.

Bexar County and the Edwards Underground Water District have waived any right to claim attorneys' fees, and the Court finds that no attorneys' fees are recoverable against the defendant James T. Lynn, Secretary of Housing and Urban Development.

ON MOTION FOR RECONSIDERATION

On the 21st day of August, 1973, came on to be considered defendant San Antonio Ranch, Ltd.'s motion for reconsideration of the Court's order approv-

ing the award of attorneys' fees, the motion of citizen plaintiffs for continuation or restoration of injunction during the pendency of appeal, and motions by both the citizen plaintiffs and the United States Department of Housing and Urban Development to tax expenses of certain witnesses as costs of court. Having reviewed the facts of this case, in addition to the briefs and affidavits filed, and authorities cited, this Court is of the opinion and finds that attorneys' fees, costs and expenses should be awarded to citizen plaintiffs in the total amount of $20,000.00; that the motion for injunction during the pendency of appeal should be denied; and that the motions filed by plaintiffs and HUD seeking to tax costs relating to the travel, subsistence, attendance, or other expenses of certain witnesses should be denied.

A. Attorneys' Fees

Defendant San Antonio Ranch, Ltd. (SAR) insists that attorneys' fees can only be awarded to a successful litigant. Though the judgment entered in this cause clearly and unequivocally denied all relief sought by the plaintiffs, it does not necessarily constitute the sole basis for determining the success or failure of plaintiffs in bringing this lawsuit.[1] As noted in this Court's order of June 28, 1973, the "final" Environmental Impact Statement filed by HUD on

[1]See Globus, Inc. v. Jaroff, 279 F.Supp. 807 (S.D.N.Y. 1968), where in a stockholders' derivative action based upon misleading use of a proxy statement concerning a stock option, cancellation of the stock option before completion of the suit made the case moot, and yet in the face of the result which plaintiff

January 23, 1972, did not, in truth and in fact, fully comply with the law, though by the time this litigation was completed such compliance had been achieved through further extensive study, research, public discussion, and planning on the part of HUD, as well as many other governmental agencies and private parties. In addition to the public meetings held by the Water Quality Advisory Review Board, composed of 18 public agencies, which resulted in that Board's approval of the project (an action that should have been taken before HUD made its final commitment), the study made by Dr. Henry V. Beck, ("Evaluation of Water Quality Studies on San Antonio Ranch, New Town") was published, as was the study on storm water runoff conducted by Dr. W. H. Espey, Jr. All of these very important events took place subsequent to the filing of this lawsuit. It is almost axiomatic that vital reports concerning the safety of the proposed project could not be evaluated fully by all governmental agencies involved, as contemplated by the NEPA, until they were completed and circulated. As a consequence, from the time the injunction in this case was originally filed to the time the trial was completed, the facts and record had changed so substantially as to make this an entirely different lawsuit. And it should be noted that the direct holding

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requested having been accomplished prior to judgment, his claim for attorneys' fees was still considered.

Several recent articles have examined the awarding of attorneys' fees in environmental litigation. *See, e. g.*, Nussbaum, Attorney's Fees in Public Interest Litigation, 48 N.Y.U.L.Rev. 301 (1973); Note, Awarding Attorney and Expert Witness Fees in Environmental Litigation, 58 Cornell L.Rev. 1222 (1973).

of this Court in its Memorandum Opinion of July 17, 1973 was "that the addendum to the Final Environmental Impact Statement, issued August 24, 1972, meets all the requirements for the 'detailed statement' required by NEPA, 42 U.S.C.A. § 4332 (C)." The addendum, which included 77 exhibits, amounting to over a foot and a half of papers, was a document far different from the first "final" Environmental Impact Statement. Essentially, the plaintiffs forced heretofore untested hypotheses to be subjected to rigorous study which did in fact reveal the project to be safe, forcing both the government and SAR to do what they should have done of their own initiative in the first place, before the Final Environmental Impact Statement was issued, and turning a preliminary hypothesis as to safety into a much more logical and reasonable conclusion. Prior to the filing of the lawsuit there was no firm assurance that all of the studies eventually done would be done, even under the moratorium imposed by HUD as a condition of their grant.

Defendant SAR maintains that Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973), specifically allows only two exceptions to the general American rule denying attorneys' fees under the Court's equitable powers: 1) when an opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons;" and 2) cases in which substantial benefits have been conferred upon members of an ascertainable class, where the court's jurisdiction makes possible an award to spread the costs proportionately

among the members of the class. This Court does not agree with that interpretation. Nowhere in Hall v. Cole does the Court limit the inherent equitable power of the federal courts to award attorneys' fees (specifically noted in the decision) to those situations exclusively. A careful reading of Hall v. Cole would seem to support the conclusion of one observer following the decision in Mills v. Electric Auto-Lite:

> Where previously the courts were led to start with the traditional rule and then ascertain whether the case fell into one of the three *Fleischmann*-approved exceptions, now they are to start with the equitable power of the courts to grant appropriate remedies with the burden on the other side to prove a legislative "purpose to circumscribe the courts' power." 38 Chi.L.Rev. 316 (1971) at 325.

Moreover, in the recent case of Ojeda v. Hackney, 452 F.2d 947 (1972), the Fifth Circuit stated:

> In sum, the equitable propriety of the allowance of any amount of attorneys' fees, and the manner in which those fees, if allowed, are to be collected, is committed entirely to that court's sound discretion . . . (At 948)

Thus even if the judgment in the above entitled case were read as totally unfavorable to the plaintiffs, and resulted in none of the relief which they originally sought, it would still remain within the inherent equitable power of the Court to award attorneys' fees if so prompted by "overriding considerations" indicating the need for such a recovery. Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702.

In the instant case these overriding considerations consist of the public service rendered by the plaintiffs, who through this litigation have helped ensure the purity and continued viability of the water in the Edwards Underground Aquifer. Attorneys' fees have been granted many times in the well recognized instances in which plaintiffs have served as "private attorneys general," and are thereafter compensated because their efforts have served the public interest by ensuring the effectuation of a strong Congressional policy. Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970). The same holds true in civil rights cases. See Cooper v. Allen, 467 F.2d 836, 841 (5th Cir. 1972). There is no reason why the protection of the public interest in this environmental case should be treated any differently.

The attorney for citizen plaintiffs in the instant case indicated in his affidavit that over 1,185 hours were spent in preparation and trial of this litigation, and all parties stipulated that the time sheets submitted in such affidavit were correct. In this connection, the Court finds that during the period from approximately February, 1972 until October, 1972, the attorney for citizen plaintiffs devoted 210 hours of the time set forth in the affidavit to his representation of Bexar County, a plaintiff which did not request and was not granted attorneys' fees in this Court's order of June 28, 1973. Accordingly, the time spent on behalf of Bexar County will not be considered as a basis for compensation.

The award of attorneys' fees is not intended to make either the client or the attorney whole, nor by

any means fully compensate counsel for the time expended in this extended and complex litigation which has stretched out over a period of a year and a half. The Court does not feel that the minimum fee schedule of the State Bar of Texas may be used as a proper basis for measuring the rate of compensation to be awarded in a case such as this. Nor does the Court find that the fee a practicing attorney would charge a private client, willing and able to pay, to be appropriate in this case. Rather, considering the Criminal Justice Act, and the purposes of that Act, the Court finds that the statutorily enumerated rate of compensation set out in 18 U.S.C. § 3006A(d) (1972), is a reasonable guide for setting compensation in public interest civil litigation. That section provides for compensation at the rate of $30 an hour for time spent in court, and $20 an hour for out-of-court time. As noted by District Judge Frank Johnson: "It is the duty of members of the legal profession to represent clients who are unable to pay for counsel and also to bring suits in the public interest." Wyatt v. Stickney, 344 F.Supp. 387, 410 (M.D.Ala.1972). The rates set out by the CJA provide neither unjust enrichment nor undue impoverishment of counsel who commendably bear a large share of the public responsibility of the legal profession.

Having considered the Criminal Justice Act, the approximate number of hours expended in this litigation, plus the complexity and novelty of this case, the skill and outstanding service performed by the opposing counsel, the importance and beneficial result

of this litigation to the public, expenses paid by plaintiffs totalling $2,620.79, costs incurred in securing witnesses, and all the facts and circumstances of the case, this Court finds that $20,000.00 is a fair and reasonable amount to cover the fees, costs and expenses incurred by plaintiffs.

B. Motions to Tax Costs

The Department of Housing and Urban Development requests that certain costs to taxed against citizen plaintiffs, and the citizen plaintiffs request that certain other costs be taxed against the defendants. These motions are made pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, and 28 U.S.C. §§ 1821 and 1920.

(1) Motion by Plaintiffs—

Plaintiffs have asked for a total award of costs in the sum of $968.40 to cover travel and other expenses of certain witnesses. However, in light of the award of $20,000.00 herein made to cover their fees and expenses, plaintiffs' motion should be and the same is hereby denied.

(2) Motion by HUD—

The Department of Housing and Urban Development has requested total fees for travel, subsistence, and attendance of $1,889.60. The Court does not dispute any of the specific costs claimed by defendant, but since, as already indicated, the award of attorneys' fees would have been spread equally between San

Antonio Ranch, Ltd., and HUD, if it were not for the prohibition of 28 U.S.C. § 2414, this Court is of the opinion that it is appropriate under the provisions of Rule 54, Federal Rules of Civil Procedure to deny such costs to HUD.

C. Motion for Continuation or Restoration of Injunction During the Pendency of Appeal

Plaintiffs have alleged in their motion for continuation or restoration of injunction during the pendency of appeal that, absent such an injunction, irreparable damage will be done to the surface cover of the Edwards Underground Aquifer, and that irrevocable financial commitments will be made by HUD and private investors. The allegation of irreparable injury is only one of the four conditions necessary to justify the issuance of an injunction pending appeal. Other requirements are that a party seeking such an injunction must make a strong showing that he is likely to succeed on the merits of the appeal, that no substantial harm will result to the other parties due to the injunction, and that the injunction will serve the public interest. Blackshear Residents Organization v. Romney, 472 F.2d 1197 (5th Cir. 1973); Beverly v. United States, 468 F.2d 732 (5th Cir. 1972); Fortune v. Molpus, 431 F.2d 799 (5th Cir. 1970); Pitcher v. Laird, 415 F.2d 743 (5th Cir. 1969); Belcher v. Birmingham Trust National Bank, 395 F.2d 685 (5th Cir. 1968).

Not only have the plaintiffs failed to demonstrate that irreparable damage will result if the injunctive

relief is not continued, but this Court does not believe that the record in this case would support a finding that there is a strong likelihood that plaintiffs will succeed in an appeal on the merits. Certainly, it would be the height of inconsistency for this Court to determine after a nine day trial that no irreparable damage to the aquifer will result if the project proceeds, and then enjoin the project because irreparable damage will result if the project is not halted. An injunction in the present case would, in practical effect, award to plaintiffs the identical relief already denied to them on the merits of the case.

However, the Court is of the firm opinion that the lifting of the injunction against further construction should not prejudice the position of either party, nor change the present status of this litigation to the disadvantage of any party. Therefore, it is specifically noted that any future construction, financial or contractual commitments, or progress of any kind or character on the SAR project shall be undertaken at the defendants' own peril. In other words, the denial of plaintiffs' motion for continuation or restoration of the injunction during the pendency of appeal is conditioned upon the premise that no evidence shall be offered, received, or considered at any future proceeding in this cause concerning any development of the project subsequent to this date, whether for the purpose of establishing grounds for equitable relief or otherwise; it being the intention of the Court that any evidence which may be presented at any future hearings or proceedings herein shall be limited to the

stage of development of the project as of March 14, 1972, the date of entry of the original injunction in this case.

It is therefore ordered that:

(1) The motion for continuation or restoration of injunction during pendency of appeal is hereby denied, subject to the condition hereinabove set forth.

(2) Attorneys' fees, costs, and expenses shall be awarded to the citizen plaintiffs in the total amount of $20,000.00 to be paid by defendant, San Antonio Ranch, Ltd.

(3) The motions by plaintiffs and HUD to tax costs relating to the travel, subsistence, attendance, or other expenses of certain witnesses are denied.

APPENDIX D

Section 3 of HUD's First Final EIS (IR No. 5)

3. *Alternatives to Proposed Action*

Three alternatives are available: The area could be preserved in its present condition, which includes cattle grazing, or it can be developed in the typical uncontrolled, unplanned "urban-sprawl" type of development, or as a carefully planned community.

(a) *Preservation of Existing Natural Environment*

As a natural environment, the area has no unique values which will be destroyed or damaged; and while species of wildlife will be displaced (e.g. deer), the site is a minor part of the range for such species and will not endanger them. Second, the area is within the shadow of San Antonio, which is the center of an area with a rapidly expanding population for which communities must be provided. Because of this location and the future development pressures, preservation of the site in its present condition is not regarded as a viable alternative.

Present use of the land include substantial grazing of cattle and several hundred head can be sustained on the property. Symptons [sic] of pollution in some streams are apparent from these activities. It is not felt that a continuation of the present uses offers a desired alternative to the proposed planned community.

To our knowledge there is no financially realistic plan for any local, state or federal government agency to acquire the site and surrounding land for the purpose of establishing a permanent non-agriculturally used park or wildlife reserve.

(b) *Unplanned Development*

The area immediately adjacent is already being subjected to traditional development compounded by the fact that centralized sanitary sewer treatment and water systems are not available in the area, making any residential or commercial development depend on septic tanks. The area growth will be accelerated further by the nearby location of the South Texas Medical Center and the new University of Texas at San Antonio. Future development will mean that pollution problems of major proportions could result in the area of the Edwards Aquifer recharge zone if such disorderly growth patterns are allowed to continue.

(c) *Planned Development*

As a "new town", the project offers an attractive alternative to such traditional type development. In particular, it will demonstrate to the public and to public officials the advantages of high quality community planning and development, and of centralized community utility services; the impact of a New Town tends to spread beyond its own limits, and may influence development over a much greater area.

A New Town is a planned community. During the preliminary phases, careful surveys and analyses are made of the site in environmental terms to identify those elements which present either problems or opportunities. This makes it possible to plan development in a manner that will assure maximum beneficial utilization of such elements, and prevention or minimizing of disturbances or damage to them.

Accordingly, since the population growth in the area projects that the site will be developed, such planned development is by far the best alternative.

APPENDIX E

Section 4 of HUD's Second Final EIS (DX-C-1, pp. 92-102)

4. *Alternatives to Proposed Action* (Updated)

Alternatives to the proposed action are:

(a) The alternative of taking no action;

(b) Alternatives requiring actions of a significantly different nature which would provide similar benefits with different environmental impacts;

(c) Alternatives related to different designs or details of the proposed action, which would present different environmental impacts.

These areas of alternatives will be reviewed in detail herein in the above order.

(a) *The alternatives of taking no action.*

One alternative open to HUD is to refuse to approve the project as described herein at the present site. This choice would result in the absence of a project built with federal assistance as a new community under Title VII.

In weighing this alternative, several factors bear on the feasibility of such a decision by HUD. First, if no action was taken, it would not seem likely that all probably adverse environmental impacts would be avoided.

One consideration is that uncontrolled development over the Edwards Aquifer would probably continue, not subject to enforcement by state and local agencies as rigorous as standards imposed on the applicant by the present project by an enforceable contract with HUD. Such uncontrolled development poses problems of implementing regulations to protect the Aquifer on agricultural uses of the land in this area, including cattle grazing and use of certain chemicals. Furthermore, unregulated develop-

ment standards pose a current problem, as well as present use of existing septic tanks, although it is recognized that the Texas Water Quality Board can enforce septic tank regulations in the area, and the City of San Antonio can regulate septic tanks in areas of the Project within the extra-territorial jurisdiction of the City which constitutes approximately 34% of the project area. (Exhibit 19)

A 1972 seminar research report on water problems of the Edwards Aquifer was prepared by the Lyndon B. Johnson School of Public Affairs of the University of Texas. This research report, conducted over a seven month period, states at page 29:

> "The prospect of *unregulated* urban development in the critical recharge zone is the most immediate threat to the quality of Edwards [Aquifer] water." (Emphasas added.) Number 1, *Water-Resource Development and Management in the Edwards Aquifer Region.*

Furthermore, the immediately adjacent area to the project is already being subjected to traditional development compounded by the fact that centralized sanitary sewer treatment and water systems are not available in the area, making any residential or commercial development presently depend only on septic tanks.

Furthermore, the growth reasonably anticipated for this area will likely be accelerated further by the nearby location of the South Texas Medical Center, the new University of Texas, United Services Automobile Association, the new University Hills private development, and by the current widening of the Bandera Highway to a four-lane divided status.

More specifically, the regional growth trends of this area of the region appear reasonable. Figures reflect growth patterns in this area which reveal that 70% of

the population growth in Bexar County between 1960 and 1969 was in the northern half of the county. These previously known statistics will continue in the future, accelerated by the new developments in this area already in progress and mentioned in the preceeding paragraph.

Thus, it appears that one environmental aspect of HUD taking no action is that it would mean probable environmental impacts due to developments in the area would not necessarily cease or be materially diminished. One environmental impact of taking no action would mean HUD's monitored and regulated development would be deferred in favor of present development regulated in a much lesser manner.

Another consideration in the "no action" alternative is the contention that HUD should delay the development and take "no action" until land-use proposals becomes law. Several factors merit discussion in this consideration. There is presently no land-use law either in Texas or at the federal level.

One cannot say precisely what this proposed law will provide when finally enacted or if it will be enacted.

Proposals for land use legislation at the federal level, at least, have contained language which would probably enable states to create agencies to coordinate land use plans with the federal government. Further provisions would establish a three or five year planning period for states to develop land-use plans. Therefore, during this three or five year planning period, undesirable environmental impacts could accrue as described earlier in this section, and tends to make a moratorium on development a more remote and less feasible alternative.

There are no current assurances that the land in question would be subject to such legislative programs, and

such decision would constitute a major policy decision by appropriate authorities, at the state and local level.

Furthermore, the land-use plans of the current project are consistent with good planning and seek to balance environmental, economic, and social values. These land use purposes are not inconsistent with HUD's purposes under Title VII. Reference here is made to Senate Report No. 92-869, "*Land Use Policy and Planning Assistance Act of 1972,*" as reported by the Committee on Interior and Insular Affairs, United States Senate, 92d Congress, 2d Session. Current data indicates the U.S. House of Representatives is considering similar legislation. Implementation of land use controls inherent in the present project by enforceable contracts with the developer will achieve desirable land controls under Title VII of the New Communities Act of 1970.

A further consideration in the "no-action" alternative is the position that "no-action" be taken by HUD until the Texas Water Quality Board sets water standards for the Edwards Recharge Area. The Texas Water Quality has not done so. This alternative does not appear to be a formulated state regulation but apparently is in the nature of an idea for future planning. While the idea may have merit, it is one of primarily state policy which is not thought necessary in order to provide safeguards to maintain satisfactory water quality for the present project pursuant to the Texas Water Quality Board's review and rereview of the project as recently as June 28, 1972, and by implementing the controls and criteria contained in this report.

Furthermore, HUD will work in a cooperative effort with Texas Water Quality Board to report to HUD using as a minimum reporting criteria those minimum criteria for water quality now required relating to drinking water

standards in the nation. These minimum criteria are those of the U. S. Department of Health, Education, and Welfare, Public Health Service, Consumer Protection and Environmental Health Service, Environmental Control Administration, "Drinking Water Standards, 1962," and standards of the U. S. Environmental Protection Agency official guidelines found in the Federal Water Pollution Control Administration, "Report of the Committee on Water Quality Criteria," 1968.

HUD will request the Texas Water Quality Board to report regularly to HUD the results of the test samples set out in the monitoring and inspection sections herein. HUD and the Texas Water Quality Board will jointly or separately determine the appropriate action to be taken to implement necessary remedial measures. HUD reserves the right to determine whether the test samples present an acceptable level of water quality for ground or surface water for HUD's purposes under Title VII.

In addition, the City of San Antonio has a right to inspect the quality of the water supply, as do a variety of other agencies including Edwards Underground Water District, San Antonio River Authority, and Bexar County.

Therefore, a reasonable system of inspection and monitoring exists and feasible reporting criteria exists.

It would appear, therefore, that no-action by HUD would result in not implementing the immediate controls over the area necessary to maintain a satisfactory environmental impact. On the other hand, waiting on proposals that have not become law could result in continued uncontrolled urban development with possible adverse environmental impact.

There appear to be no inconsistent purposes between balancing the environmental uses of the land under the

present project and these current proposals for new legislation.

(b) *Alternatives requiring actions of a significantly different nature which would provide similar benefits with different environmental impacts.*

One alternative in this area could be to plar a Title VII community in the northwest quadrant, but not over the recharge zone. This alternative might result in one advantage of costing less money for services to the area, but that factor has been weighed with other apparent disadvantages. For example, the 30-year growth patterns reveal that such a new town closer to the city limits may well outstrip its long-range needs. Furthermore, such a plan would possibly spawn growth into the sensitive area which has an immediate need of regulations on development. In addition, development in the area reveals a trend, not back toward the inner city but to an available area sufficient to satisfy long-range needs, and in areas of less density.

Therefore, better planning would appear to dictate that such planning be consistent with a proper balancing of environmental values in an orderly balanced community.

Another alternative is to approve the project as it presently is designed, but seek another sitc for its location. This alternative has several advantages and disadvantages. In the first place, it would require the selection of another adequate site. It should be remembered that the developers presently own nearly all of the acreage at the present site and if HUD required another site, the developers could sell the present site to raise additional capital to purchase land or to develop the site in a conventional manner. In either event the site would be developed without the rigid controls which would otherwise be required by HUD.

Obviously, another possible result of this alternative is that the project might not be built anywhere.

The advantage of moving the project to another site would be to resolve the current environmental impacts of a New Town at the current site but would leave the site open to the same adverse impacts stated under "no-action," without rigid controls on land use. The northwest quadrant of San Antonio would still pose development problems of uncontrolled growth and septic tanks.

Furthermore, HUD is in the process of reviewing a new-town-in-town pre-application in downtown San Antonio which if satisfactorily approved by HUD would be advantageous in resolving the needs of citizens elsewhere in the area.

Other data available for reference is the *Report on National Growth,* 1972, which was submitted by the President of the United States to Congress in February, 1972. It was prepared by the Domestic Council Committee on National Growth, pursuant to the requirements of Section 703(a) of the *Housing and Urban Development Act of 1970,* PL. 91-609. This is the act under which the present project seeks financial assistance. This document details growth patterns in the United States which are consistent with the present selected site reflecting the need for low density living areas for people in well-balanced communities which give due regard to environmental factors.

Finally, in weighing of the alternatives is the principle that the same project at a different site could not satisfactorily perform the purposes of Title VII in attempting to plan communities to satisfy the needs of people. If people will need to live in the northwest quadrant, and growth trends show that people believe that they do, a project elsewhere will not satisfy that need.

Environmental considerations of the present project is [sic] weighed along with these other considerations.

(c) *Alternatives related to different designs or details of the proposed action, which would present different environmental impacts.*

Another alternative on the same site would be for HUD to approve the project under Title VII but require that it be of different size or design.

Inherent in this alternative is a consideration of certain factors relative to the desire to plan a project adequate in size to accommodate growth caused by other projects, such as the Medical Center, University of Texas, United Services Automobile Association, and the University Hill development growth. If a project is approved on the site, it should be of sufficient size to accommodate most of the potential residents of the area. Furthermore, better planning is possible based on the detailed studies justified by a large project rather than piecemeal approvals by HUD of smaller sequential projects. A project sufficient to cover anticipated growth also allows for better financing by the developer.

Approval of a smaller project on the same site is possible, but it could result in a regulated smaller development surrounded by unregulated communities which would have the same environmental problems that the present project is designed to minimize.

It is possible that a smaller project could be less costly, and possibly easier to regulate. This alternative has been weighed against its disadvantages in planning and funding as well as environmental considerations.

235 or 236 type housing could be built on the site, but the comprehensive planning inherent in a Title VII com-

munity promotes better total planning and 235 or 236 housing alone would not satisfy the rigid environmental requirements of the present project, nor would such smaller housing accommodations appear to alleviate the present problems of uncontrolled sprawl with its adverse environmental impacts.

A different level of design at the present site would appear not to add environmental benefits incidental to the present size and scope. All designs of land use, greenbelts, and all systems on the ranch are better planned under Title VII which provides for amendments, and updating to meet the latest, most feasible design criteria which would not appear as satisfactory under other housing concepts. Furthermore, the enforceable contract between HUD and the developer promotes more rigid controls over land use.

It seems feasible to require the land-use plan to reflect initial development in areas not near the sensitive areas of the recharge zone and thus design the staging of the development to permit reasonable assessment of that type of staging.

Furthermore, the size, scope, and the design of the present project would appear to be compatible with long-range population demands not out of the proportion to the total area comprising the large entire Edwards Acquifer [sic] area.

A totally planned community can well influence other future developments in areas, should they occur, by the setting of rigid controls. It does not appear likely a smaller, less totally planned development would have such beneficial influence.

APPENDIX F, PX-44

TEXAS WATER QUALITY BOARD

AUSTIN, TEXAS

TO: Hugh C. Yantis, Jr., Executive Director
THRU: Bob Fleming, P.E., Director, Central Operations
FROM: Garner E. Jones, P.E., Planning & Research

SUBJECT: San Antonio Ranch Project

INTER-OFFICE MEMORANDUM

In response to a request from Mr. Bob Honts to comment on the Special Report by L. J. Turk to the San Antonio Ranch Water Quality Advisory Review Board, we have obtained from the Subsurface Section their comments and views on the subject. We felt these comments warranted your personal action.

GEJ:rz

Attachment

Signed Garner E. Jones

Date June 9, 1972

A102

TEXAS WATER QUALITY BOARD

AUSTIN, TEXAS

TO: Mike McKann, Planning & Research

FROM: Bob Hill, Subsurface Section

SUBJECT: Comments on the Special Report by L. J. Turk to the San Antonio Ranch Water Quality Advisory Review Board Dated May 11, 1972

INTER-OFFICE MEMORANDUM

To fully understand the above referenced report, it was necessary to refer to an earlier report by Dr. Turk to the same board. This special report was dated April 24, 1972 and outlined the method of study.

The report of May 11, 1972 gives a summary of the research work accomplished to that date. All of the data is incomplete and the results of some studies were not available.

The study includes a detailed mapping of the San Antonio Ranch New Town area, however, mapping is not complete at this time. Much of the San Antonio Ranch is on the outcrop of the Edwards Formation where recharge to the Edwards aquifer occurs at the surface. The recharge occurs through solution channels and fractures throughout the area, but has a higher infiltration rate in the creek bottoms where the outcrop is bare of soil and the outcrop is exposed to running water for longer periods.

Turk has stated that after providing control of sanitary sewer lines and other dangerous fluids, the "only remaining pollution threat (to the Edwards Aquifer) is storm water runoff, which is a minor hazard compared with sewage and solid waste". I certainly cannot agree with this statement, because the infiltration of rainfall with its accompanying bacteria, viruses, insecticides, fertilizers, etc. do constitute a serious pollutional hazard on the sensitive Edwards outcrop. Further despite proposed lined channels for removing runoff from the area, it is not likely that all of the 9,200-acre tract could be curbed in such a manner to catch all runoff.

The report (May 11, 1972) has given some figures on runoff water quality from a 175-acre subdivision and to use this as a pilot study. This small subdivision cannot be equated with the San Antonio Ranch

Signed _____

Date _____

POOR COPY

tract because (1) it is on an outcrop of the Anacacho limestone instead of the Edwards aquifer and (2) the type of pollutants in one small subdivision will not be the same as that of a complete city.

However, even from this small subdivision, the runoff indicated high concentrations of Fecal streptococcus. Presumably this bacteria was primarily from pets in the subdivision. This same or higher concentration would occur in the San Antonio Ranch town of which a large portion could infiltrate to the Edwards aquifer.

The report indicated that Edwards groundwater from two wells in the San Antonio Ranch area were already polluted with coliform bacteria. This pollution could have occurred from improper completed water wells, or from infiltration from the surface through solution channels. It only points up the sensitivity of the area to possible pollution from surface activity. Fortunately, the pollution is probably confined to the local area of the wells.

The report proposes to study the fracture alignment and concentration in the San Antonio Ranch area. I believe such a study would not be very helpful for a large amount of infiltration occurs in solution channels, which admittedly began in fractures, but has no relationship to the direction and concentration of fractures.

It should be pointed out the construction of a town on the original 9,200-acres will open Pandora's box and cause additional development around the town. This additional development undoubtedly would have even less control than those proposed for San Antonio Ranch. Consequently within a few short years, the water supply for San Antonio would have to be treated, particularly chlorination, to safeguard the health of its residents.

BH:bl

Signed Bob Hill
Bob Hill

Date June 1, 1972

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FILED
APR 18 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1310

EDWARDS UNDERGROUND WATER DISTRICT; BEXAR COUNTY, TEXAS; CITIZENS FOR A BETTER ENVIRONMENT; AND LEAGUE OF WOMEN VOTERS,

Petitioners,

vs.

JAMES T. LYNN, SECRETARY OF THE U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; AND SAN ANTONIO RANCH, LTD.,

Respondents.

APPENDIX OF APPLICABLE STATUTES, REGULATIONS, CIRCULARS AND OTHER AUTHORITY CITED IN PETITIONERS-APPELLANTS' BRIEF

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TABLE OF APPLICABLE STATUTES, REGULATIONS, CIRCULARS, AND OTHER AUTHORITY

1. The National Environmental Policy Act of 1969, 42 U.S.C. §4321 et seq. 1

2. The Urban Growth And New Community Development Act of 1970, 42 U.S.C. §4501 et seq. 5

3. The Council on Environmental Quality, Statement on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. No. 79 (April 23, 1971) 15

4. The Council on Environmental Quality, Memorandum For Agency And General Counsel Liaison on NEPA Matters (May 16, 1972) . . 20

5. The Council on Environmental Quality, Guidelines For Preparation of Environmental Impact Statements, 40 C.F.R. § 1500 (1973) 25

6. The Department of Housing and Urban Development, Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality. 33

7. The Department of Housing and Urban Development, Regulations on Urban Growth And New Community Development Act of 1970, 24 C.F.R. §32 (36 Fed. Reg. 14205-14 (July 31, 1971) 39

8. The Department of Housing and Urban Development, Circular on Areawide Planning Requirements, Circular MPD 6415.1A . . . 50 12-14 (July 31, 1970)

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THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

42 U.S.C. §4321 et seq.

THE NATIONAL ENVIRONMENTAL POLICY ACT

PURPOSE

Sec. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may–

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of out national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall–

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

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(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

Sec. 201. The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest dryland, wetland, range, urban, suburban, and rural environment; (2) current and forseeable trends in the quality, management and utilization of such enivornments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Sec. 202. There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

Sec. 203. The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

Sec. 204. It shall be the duty and function of the Council—

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 201;

(2) to gather timely and authorative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

Sec. 205. In exercising its powers, functions, and duties under this Act, the Council shall—

(1) consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order numbered 11472, dated May 29, 1969, and with such

representatives of science, industry, agriculture, labor, conservation organizations, State and local governments, and other groups, as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

Sec.206. Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313). The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates (5 U.S.C. 5315).

Sec. 207. There are authorized to be appropriated to carry out the provisions of this Act not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.

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THE URBAN GROWTH AND NEW COMMUNITY DEVELOPMENT ACT OF 1970

42 U.S.C. §450] *et seq.*

CHAPTER 59.—URBAN GROWTH AND NEW COMMUNITY DEVELOPMENT

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§ 4501. Congressional statement of purpose.

It is the policy of the Congress and the purpose of this chapter to provide for the development of a national urban growth policy and to encourage the rational, orderly, efficient, and economic growth, development, and redevelopment of our States, metropolitan areas, cities, counties, towns, and communities in predominantly rural areas which demonstrate a special potential for accelerated growth; to encourage the prudent use and conservation of our natural resources; and to encourage and support development which will assure our communities of adequate tax bases, community services, job opportunities, and well-balanced neighborhoods in socially, economically, and physically attractive living environments. (Pub. L. 91-609, title VII, § 701 (b), Dec. 31, 1970, 84 Stat. 1791.)

REFERENCES IN TEXT

"This chapter", referred to in the text, read "this title" in the original, meaning Urban Growth and New Community Development Act of 1970, for classification of which in the Code see Short Title note under this section.

SHORT TITLE

Section 701(a) of Pub. L. 91-609 provided that: "This title [which enacted this chapter and section 461(j) of Title 40, amended sections 1453(a)(1), 1460(c)(7), and 1492(b)(4) of this title, sections 371 and 1464(c) twelfth par. of Title 12, and section 461(a)(4), (b) of Title 40, and enacted provisions set out as a note under section 1453 of this title] may be cited as the 'Urban Growth and New Community Development Act of 1970'."

PART A.—DEVELOPMENT OF A NATIONAL URBAN GROWTH POLICY

§ 4502. Congressional findings and declaration of policy.

(a) The Congress finds that the rapid growth of urban population and uneven expansion of urban development in the United States, together with a decline in farm population, slower growth in rural areas, and migration to the cities, has created an imbalance between the Nation's needs and resources and seriously threatens our physical environment, and that the economic and social development of the Nation, the proper conservation of our natural resources, and the achievement of satisfactory living standards depend upon the sound, orderly, and more balanced development of all areas of the Nation.

(b) The Congress further finds that Federal programs affect the location of population, economic growth, and the character of urban development; that such programs frequently conflict and result in undesirable and costly patterns of urban development which adversely affect the environment and wastefully use our natural resources; and that existing and future programs must be interrelated and coordinated within a system of orderly development and established priorities consistent with a national urban growth policy.

(c) To promote the general welfare and properly apply the resources of the Federal Government in strengthening the economic and social health of all areas of the Nation and more adequately protect the physical environment and conserve natural resources, the Congress declares that the Federal Government, consistent with the responsibilities of State and local government and the private sector, must assume responsibility for the development of a national urban growth policy which shall incorporate social, economic, and other appropriate factors. Such policy shall serve as a guide in making specific decisions at the national level which affect the pattern of urban growth and shall provide a framework for development of interstate, State, and local growth and stabilization policy.

(d) The Congress further declares that the national urban growth policy should—

(1) favor patterns of urbanization and economic development and stabilization which offer a rang

of alternative locations and encourage the wise and balanced use of physical and human resources in metropolitan and urban regions as well as in smaller urban places which have a potential for accelerated growth;

(2) foster the continued economic strength of all parts of the United States, including central cities, suburbs, smaller communities, local neighborhoods, and rural areas;

(3) help reverse trends of migration and physical growth which reinforce disparities among States, regions, and cities;

(4) treat comprehensively the problems of poverty and employment (including the erosion of tax bases, and the need for better community services and job opportunities) which are associated with disorderly urbanization and rural decline;

(5) develop means to encourage good housing for all Americans without regard to race or creed;

(6) refine the role of the Federal Government in revitalizing existing communities and encouraging planned, large-scale urban and new community development;

(7) strengthen the capacity of general governmental institutions to contribute to balanced urban growth and stabilization; and

(8) facilitate increased coordination in the administration of Federal programs so as to encourage desirable patterns of urban growth and stabilization, the prudent use of natural resources, and the protection of the physical environment.

(Pub. L. 91–609, title VII, § 702, Dec. 31, 1970, 84 Stat. 1791.)

§ 4503. Urban growth report; supplementary reports, transmittal to Congress; advisory board, establishment.

(a) In order to assist in the development of a national urban growth policy, the President shall utilize the capacity of his office, adequately organized and staffed for the purpose, through an identified unit of the Domestic Council, and of the departments and agencies within the executive branch to collect, analyze, and evaluate such statistics, data, and other information (including demographic, economic, social, land use, environmental, and governmental information) as will enable him to transmit to the Congress, during the month of February in every even-numbered year beginning with 1972, a Report on Urban Growth for the preceding two calendar years which shall include—

(1) information and statistics describing characteristics of urban growth and stabilization and identifying significant trends and developments;

(2) a summary of significant problems facing the United States as a result of urban growth trends and development;

(3) an evaluation of the progress and effectiveness of Federal efforts designed to meet such problems and to carry out the national urban growth policy;

(4) an assessment of the policies and structure of existing and proposed interstate planning and developments affecting such policy;

(5) a review of State, local, and private policies, plans, and programs relevant to such policy;

(6) current and foreseeable needs in the areas served by policies, plans, and programs designed to carry out such policy, and the steps being taken to meet such needs; and

(7) recommendations for programs and policies for carrying out such policy, including such legislation and administrative actions as may be deemed necessary and desirable.

(b) The President may transmit from time to time to the Congress supplementary reports on urban growth which shall include such supplementary and revised recommendations as may be appropriate.

(c) To assist in the preparation of the Report on Urban Growth and any supplementary reports, the President may establish an advisory board, or seek the advice from time to time of temporary advisory boards, the members of whom shall be drawn from among private citizens familiar with the problems of urban growth and from among Federal officials, Governors of States, mayors, county officials, members of State and local legislative bodies, and others qualified to assist in the preparation of such reports. (Pub. L. 91–609, title VII, § 703, Dec. 31, 1970, 84 Stat. 1792.)

PART B.—DEVELOPMENT OF NEW COMMUNITIES

§ 4511. Congressional findings and purpose; new community development; Federal financial assistance; Federal government, organizational improvement.

(a) The Congress finds that this Nation is likely to experience during the remaining years of this century a population increase of about seventy-five million persons.

(b) The Congress further finds that continuation of established patterns of urban development, together with the anticipated increase in population, will result in (1) inefficient and wasteful use of land resources which are of national economic and environmental importance; (2) destruction of irreplaceable natural and recreational resources and increasing pollution of air and water; (3) diminished opportunity for the private homebuilding industry to operate at its highest potential capacity in providing good housing needed to serve the expanding population and to replace substandard housing; (4) costly and inefficient public facilities and services at all levels of government; (5) unduly limited options for many of our people as to where they may live, and the types of housing and environment in which they may live; (6) failure to make the most economic use of present and potential resources of many of the Nation's smaller cities and towns, including those in rural and economically depressed areas, and decreasing employment and business opportunities for their residents; (7) further lessening of employment and business opportunities for the residents of central cities and of the

ability of such cities to retain a tax base adequate to support vital services for all their citizens, particularly the poor and disadvantaged; (8) further separation of people within metropolitan areas by income and by race; (9) further increases in the distances between the places where people live and where they work and find recreation; and (10) increased cost and decreased effectiveness of public and private facilities for urban transportation.

(c) The Congress further finds that better patterns of urban development and revitalization are essential to accommodate future population growth; to prevent further deterioration of the Nation's physical and social environment; and to make positive contributions to improving the overall quality of life within the Nation.

(d) The Congress further finds that the national welfare requires the encouragement of well-planned, diversified, and economically sound new communities, including major additions to existing communities, as one of several essential elements of a consistent national program for bettering patterns of development and renewal.

(e) The Congress further finds that desirable new community development on a significant national scale has been prevented by difficulties in (1) obtaining adequate financing at moderate cost for enterprises which involve large initial capital investment, extensive periods before investment can be returned, and irregular patterns of returns; (2) the timely assembly of sufficiently large sites in economically favorable locations at reasonable cost; and (3) making necessary arrangements, among all private and public organizations involved, for providing site and related improvements (including streets, sewer and water facilities, and other public and community facilities) in a timely and coordinated manner.

(f) It is, therefore, the purpose of this part to provide private developers and State and local public bodies and agencies (including regional or metropolitan public bodies and agencies) with financial and other assistance necessary for encouraging the orderly development of well-planned, diversified, and economically sound new communities, including major additions to existing communities, and to do so in a manner which will rely to the maximum extent on private enterprise; strengthen the capacity of State and local governments to deal with local problems; preserve and enhance both the natural and urban environment; increase for all persons, particularly members of minority groups, the available choices of locations for living and working, thereby providing a more just economic and social environment; encourage the fullest utilization of the economic potential of older central cities, smaller towns, and rural communities; assist in the efficient production of a steady supply of residential, commercial, and industrial building sites at reasonable cost; increase the capability of all segments of the home-building industry, including both small and large producers, to utilize improved technology in producing the large volume of well-designed, inexpensive housing needed to accommodate population growth; help create neighborhoods designed for easier access between the places where people live and the places where they work and find recreation; and encourage desirable innovation in meeting domestic problems whether physical, economic, or social. It is also the purpose of this part to improve the organizational capacity of the Federal Government to carry out programs of assistance for the development of new communities and the revitalization of the Nation's urban areas. (Pub. L. 91–609, title VII, § 710, Dec. 31, 1970, 84 Stat. 1793.)

§ 4512. Definitions.

As used in this part—

(a) The term "new community development program" means a program which is intended to result in a newly built community or a major addition to an existing community and which meets the eligibility standards set forth in section 4513 of this title.

(b) The term "private new community developer" means any private entity organized in a form satisfactory to the Secretary for carrying out one or more new community development programs.

(c) The term "State land development agency" means any State or local public body or agency with authority to act as developer in carrying out one or more new community development programs.

(d) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of any of the foregoing.

(e) The term "local public body or agency" means any public body or agency, including a political subdivision, created by or under the laws of a State or two or more States, or a combination of such bodies or agencies.

(f) The term "land development" means the process of clearing and grading land, making, installing, or constructing waterlines and water supply installations, sewerlines and sewage disposal installations, steam, gas, and electric lines and installations, roads, streets, curbs, gutters, sidewalks, storm drainage facilities, and other installations or work, whether on or off the site, which the Secretary deems necessary or desirable to prepare land for residential, commercial, industrial, or other uses, or to provide facilities for public or common use. The term "land development" includes the construction of public facilities, but does not include the construction of any other building unless it is (1) needed in connection with a water supply or sewage disposal installation or a steam, gas, or electric line or installation, or (2) is to be owned and maintained by residents of the new community under joint or cooperative arrangements approved by the Secretary.

(g) The term "actual cost" means the costs (exclusive of rebates or discounts) incurred by a new community developer in carrying out the land development assisted under this chapter. These costs may include amounts paid for labor, materials, construction contracts, land planning, engineers' and architect's fees, surveys, taxes, and interest during development, organizational and legal expenses, such allocation of general overhead expenses as are acceptable to the Secretary, and other items of expense incidental to development which may be approved by the Secretary. If the Secretary determines

that there is an identity of interest between the developer and a contractor, there may be included as a part of actual cost an allowance for the contractor's profit or risk an amount deemed reasonable by the Secretary.

(h) The term "Secretary" means the Secretary of Housing and Urban Development.

(i) The term "Community Development Corporation" means the corporation established within the Department of Housing and Urban Development under section 4532 of this title. (Pub. L. 91–609, title VII, § 711, Dec. 31, 1970, 84 Stat. 1795.)

REFERENCES IN TEXT

"This chapter", referred to in subsec. (g), read "this Act" in the original, probably meaning Urban Growth and New Community Development Act of 1970, Title VII of Pub. L. 91–609, classified to this chapter and not Housing and Urban Development Act of 1970, Pub. L. 91–609, for classification of which in the Code see Short Title note under section 1701s of Title 12, Banks and Banking.

§ 4513. Eligible new community development.

(a) A new community development program is eligible for assistance under this part only if the Secretary determines that the program (or the new community it contemplates)—

(1) will provide an alternative to disorderly urban growth, helping preserve or enhance desirable aspects of the natural and urban environment or so improving general and economic conditions in established communities as to help reverse migration from existing cities or rural areas;

(2) will be economically feasible in terms of economic base or potential for economic growth;

(3) will contribute to the welfare of the entire area which will be substantially affected by the program and of which the land to be developed is a part;

(4) is consistent with comprehensive planning, physical and social, determined by the Secretary to provide an adequate basis for evaluating the new community development program in relation to other plans (including State, local, and private plans) and activities involving area population, housing and development trends, and transportation, water, sewerage, open space, recreation, and other relevant facilities;

(5) has received all governmental reviews and approvals required by State or local law, or by the Secretary;

(6) will contribute to good living conditions in the community, and that such community will be characterized by well balanced and diversified land use patterns and will include or be served by adequate public, community, and commercial facilities (including facilities needed for education, health and social services, recreation, and transportation) deemed satisfactory by the Secretary;

(7) makes substantial provision for housing within the means of persons of low and moderate income and that such housing will constitute an appropriate proportion of the community's housing supply; and

(8) will make significant use of advances in design and technology with respect to land utilization, materials and methods of construction, and the provision of community facilities and services.

(b) A new community development program approved for assistance under this part shall be undertaken by a private new community developer or State land development agency approved by the Secretary on the basis of financial, technical, and administrative ability which demonstrates capacity to carry out the program with reasonable assurance of its completion. (Pub. L. 91–609, title VII, § 712, Dec. 31, 1970, 84 Stat. 1796.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 4512, 4528 of this title.

§ 4514. Guarantees; prohibition; grants; limitations.

(a) The Secretary (acting through the Community Development Corporation) is authorized to guarantee, and enter into commitments to guarantee, the bonds, debentures, notes, and other obligations issued by or on behalf of private new community developers and State land development agencies for the purpose of financing real property acquisition and land development and to compensate for the use of real property or the removal of liens or encumbrances on such property, pursuant to the new community development programs approved by the Secretary. The Secretary may make such guarantees and enter into such commitments upon such terms and conditions as he may prescribe consistent with the limitations and conditions contained in section 4517 of this title; except that no obligation of any State land development agency shall be guaranteed under this section if the income from such obligation is exempt from Federal taxation. The Secretary is authorized to make grants to any State land development agency the obligations of which are guaranteed under this section in amounts estimated by him not to exceed the difference between the interest paid on such obligations and the interest on similar obligations the income from which is exempt from Federal taxation.

(b) The full faith and credit of the United States is pledged to the payment of all guarantees made under this section with respect to principal, interest, and any redemption premiums. Any such guarantee made by the Secretary shall be conclusive evidence of the eligibility of the obligations for such guarantee, and the validity of any guarantee so made shall be incontestable in the hands of a holder of the guaranteed obligation.

(c) The outstanding bonds, debentures, notes or other obligations guaranteed under this section with respect to a single new community development program shall involve a principal obligation in an amount (1) in the case of a State land development agency, not exceeding 100 per centum of the sum of the Secretary's estimate of the value of the real property before development and his estimate of the actual cost of the land development, or (2) in the case of a private new community developer, not exceeding the sum of 80 per centum of the Secretary's estimate of the value of the real property before development and 90 per centum of his estimate of the actual cost of the land development.

(d) The outstanding principal obligations guaranteed under this section with respect to a single new community development program shall at no time exceed $50,000,000.

(e) The aggregate of the outstanding principal obligations guaranteed under this section shall at no time exceed $500,000,000. (Pub. L. 91–609, title VII, § 713, Dec. 31, 1970, 84 Stat. 1796.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 4518 of this title.

§ 4515. Loans; repayment; interest rate; limitations.

(a) The Secretary (acting through the Community Development Corporation) is authorized, subject to the limitations and conditions contained in section 4517 of this title, to make and enter into agreements to make loans to or on behalf of private new community developers and State land development agencies for the purpose of assisting them to make interest payments on indebtedness incurred by them to finance new community development programs approved by him. Loans under this section shall be in amounts which do not exceed the amount of interest the Secretary estimates is payable on indebtedness attributable to land acquisition or land development and shall be made only with respect to interest payments on indebtedness outstanding during an initial development period (not to exceed fifteen years) which the Secretary estimates to be prior to the time when land marketing activity is of sufficient volume to permit continued development under the new community development program without the benefit of further loans under this section.

(b) The Secretary shall require that loans under this section shall be repaid, with interest and on terms and conditions satisfactory to him, commencing at such time as development progress and marketing under the new community development program permit such repayment, but not later than fifteen years after the date the loan is made. Such loans shall bear interest at a rate specified by the Secretary which shall not be less than a rate determined by the Secretary of the Treasury taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loans, plus one-eighth of 1 per centum.

(c) The principal amount of the loans outstanding at any time under this section with respect to a single new community development program shall not exceed $20,000,000.

(d) The aggregate principal amount of the loans outstanding under this section shall at no time exceed $240,000,000. (Pub. L. 91–609, title VII, § 714, Dec. 31, 1970, 84 Stat. 1797.)

§ 4516. Public service grants; authorization of appropriations.

In addition to providing assistance under the preceding sections, the Secretary (acting through the Community Development Corporation) may make public service grants (in such amounts and on such terms and conditions as he deems appropriate) to a State land development agency or to the State or local public body having responsibility for providing the services involved to cover the cost of providing during an initial period (not exceeding three years) essential public services (including educational, health, and safety services) which the Secretary deems necessary adequately to serve the needs of the residents of the development prior to completion of permanent arrangements for the provisions of such services. There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this section. (Pub. L. 91–609, title VII, § 715, Dec. 31, 1970, 84 Stat. 1798.)

§ 4517. Limitations on guarantees and loans.

(a) No guarantee or loan shall be made under this part unless the Secretary has determined that the new community development program represents an acceptable financial risk to the United States, taking into consideration (1) the financial and security interests of the United States, including the manner in which the developer proposes to finance and schedule land acquisition, land development, and marketing, and (2) the public purposes of this part and the special problems involved in financing new communities, including (i) the large amount of initial capital required to finance sound new communities, (ii) the extended period before initial returns can be expected, and (iii) the irregular pattern of cash returns characteristic of this type of development.

(b) The Secretary shall take such steps as he considers reasonable to assure that bonds, debentures, notes, and other obligations guaranteed, or with respect to which interest loans are made, under this part will—

(1) be issued to investors approved by, or meeting requirements prescribed by, the Secretary, or if an offering to the public is contemplated, be underwritten upon terms and conditions approved by the Secretary;

(2) bear interest at a rate satisfactory to the Secretary;

(3) contain or be subject to repayment, maturity, and other provisions satisfactory to the Secretary; and

(4) contain or be subject to provisions with respect to the protection of the security interests of the United States, including any provisions deemed appropriate by the Secretary relating to subrogation, liens, and releases of liens, payment of taxes, cost certification procedures, escrow or trusteeship requirements or other matters.

(Pub. L. 91–609, title VII, § 716, Dec. 31, 1970, 84 Stat. 1798.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 4514, 4515, 4528 of this title.

§ 4518. Revolving fund; establishment; expenses, payment.

(a) The Secretary is authorized to establish a revolving fund to provide for (1) the timely payment of any liabilities incurred as the result of guarantees or grants under section 4514 of this title; (2) making loans authorized under this part; (3) payment of obligations issued to the Secretary of the Treasury under subsection (b) of this section; and (4) any other program expenditures, including administrative and nonadministrative expenses. Such revolving fund shall be comprised of (1) receipts from fees

and charges; (2) recoveries under security, subrogation, and other rights; (3) repayments, interest income, and any other receipts obtained in connection with guarantees or loans under this part; (4) proceeds of the obligations issued to the Secretary of the Treasury pursuant to subsection (b) of this section; and (5) such sums, which are hereby authorized to be appropriated, as may be required for the payment of the obligations issued to the Secretary of the Treasury for the purpose of making grants to State land development agencies under section 4514 of this title, and for other purposes under this part. Money in the revolving fund not currently needed for the purpose of this part shall be kept in cash on hand or on deposit, or invested in obligations of the United States or guaranteed thereby, or in obligations, participations, or other instruments which are lawful investments for fiduciary, trust, or public funds.

(b) The Secretary may issue obligations to the Secretary of the Treasury in an amount sufficient to enable the Secretary to carry out the functions authorized by this part. The obligations issued under this subsection shall have such maturities and bear such rate or rates of interest as shall be determined by the Secretary of the Treasury. The Secretary of the Treasury is authorized and directed to purchase any obligations so issued, and for that purpose he is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act, and the purposes for which securities may be issued under that Act are extended to include purchases of the obligations, hereunder.

(c) Notwithstanding any other provision of law relating to the acquisition, handling, improvement, disposal of real and other property by the United States, the Secretary shall have power, for the protection of the interests of the fund authorized under this section, to pay out of such fund all expenses or charges in connection with the acquisition, handling, improvement, or disposal of any property, real or personal, acquired by him as a result of recoveries under security, subrogation, or other rights. (Pub. L. 91–609, title VII, § 717, Dec. 31, 1970, 84 Stat. 1798.)

REFERENCES IN TEXT

The Second Liberty Bond Act referred to in subsec. (b), is act Sept. 24, 1917, 40 Stat. 288, as amended, which is classified to section 745, former section 747, sections 752, 752a, 753, 754, 754a, 754b, 757, 757b, and 757c, former section 757c–1, sections 757–2, 757c–3, 757c–4, 757d, 757e, 758, 760, 764, former section 765, and sections 768, 769, 771, 773, 774, and 801 of Title 31, Money and Finance.

That Act, referred to in subsec. (b), means the Second Liberty Bond Act.

§ 4519. Supplementary grants for public facilities; new community assistance project; authorization of appropriations.

(a) The Secretary is authorized to make supplementary grants to any State or local public body or agency carrying out a new community assistance project, as defined in subsection (c) of this section, if the Secretary determines that such project is necessary or desirable for carrying out a new community development program. In no case shall any grant under this section exceed 20 per centum of the cost of the new community assistance project for which the grant is made; and in no case shall the total Federal contributions to the cost of such project be more than 80 per centum.

(b) In carrying out his authority under this section, the Secretary shall, with respect to any new community assistance project assisted by grants administered by a Federal department or agency other than the Department of Housing and Urban Development, consult with such department or agency concerning the project; and he shall, for the purpose of subsection (a) of this section, accept the certification of such department or agency as to the cost of such project.

(c) For the purposes of this section, a "new community assistance project" is a project assisted by grants under section 3 of the Urban Mass Transportation Act of 1964; section 120(a) of title 23, United States Code; section 19 of the Airport and Airway Development Act of 1970; title VI of the Public Health Service Act; title II of the Library Services and Construction Act; section 5 of the Land and Water Conservation Fund Act of 1965; title VII of the Housing Act of 1961; section 702 or 703 of the Housing and Urban Development Act of 1965; section 8 of the Federal Water Pollution Control Act; section 306(a)(2) of the Consolidated Farmers Home Administration Act; section 103 or 104 of the Higher Education Facilities Act of 1963; or section 101(a)(1) of the Public Works and Economic Development Act of 1965 with respect to projects of a type eligible for assistance under any of the other provisions of law listed in this subsection.

(d) There are authorized to be appropriated for supplementary grants under this section not to exceed $36,000,000 for the fiscal year ending June 30, 1971, not to exceed $66,000,000 for each of the fiscal years ending June 30, 1972, and June 30, 1973, and not to exceed such sums as may be necessary for any fiscal year commencing after June 30, 1973. Any amount so appropriated shall remain available until expended, and any amounts authorized for any fiscal year but not appropriated may be appropriated for any succeeding fiscal year. In addition, the amounts authorized to be appropriated for grants under section 412 of the Housing and Urban Development Act of 1968 and the amounts appropriated thereunder shall be available for carrying out this section and shall remain available until appropriated and expended. (Pub. L. 91–609, title VII, § 718, Dec. 31, 1970, 84 Stat. 1799.)

REFERENCES IN TEXT

The provisions, referred to in subsec. (c), are classified to the Code, as follows:

Section 3 of Urban Mass Transportation Act of 1964 (Pub. L. 88-365, July 9, 1964, 78 Stat. 302, as amended) is classified to section 1602 of Title 49, Transportation.

Section 19 of the Airport and Airway Development Act of 1970 (Pub. L. 91–258, Title I, May 21, 1970, 84 Stat. 219) is classified to section 1719 of Title 49.

Title VI of Public Health Service Act (Act July 1, 1944, c. 373, 58 Stat. 682, as amended), is classified to section 291 et seq. of this title.

Title II of Library Services and Construction Act (Act June 19, 1956, c. 407, 70 Stat. 293, as amended), is classified to section 355a et seq. of Title 20, Education.

Section 5 of Land and Water Conservation Fund Act of 1965 (Pub. L. 88–578, Sept. 3, 1964, 78 Stat. 897), is classified to section 4601–8 of Title 16, Conservation.

Title VII of Housing Act of 1961 (Pub. L. 87–70, June 1961, 75 Stat. 149, as amended), is classified to chapter 8C (section 1600 et seq.) of this title.

Section 702 and 703 of Housing and Urban Development Act of 1965 (Pub. L. 89–117, Aug. 10, 1965, 79 Stat. 451, as amended) are classified to sections 3102 and 3103 of this title.

Section 6 of Federal Water Pollution Control Act (Act June 30, 1948, c. 758, 62 Stat. 1155, as amended) is classified to section 1158 of Title 33, Navigation and Navigable Waters.

Section 306(a)(2) of Consolidated Farmers Home Administration Act (Pub. L. 87–128, Title III, Aug. 8, 1961, 75 Stat. 307) is classified to section 1926(a) (2) of Title 7, Agriculture.

Sections 103 and 104 of Higher Education Facilities Act of 1963 (Pub. L. 88–204, Dec. 16, 1963, 77 Stat. 363) are classified to sections 715 and 716 of Title 20, Education.

Section 101(a)(1) of Public Works and Economic Development Act of 1965 (Pub. L. 89–136, Aug. 26, 1965, 79 Stat. 552) is classified to section 3131 of this title.

Section 412 of Housing and Urban Development Act of 1968 (Pub. L. 90–448, Aug. 1, 1968, 82 Stat. 476) is classified to section 3911 of this title.

§ 4520. Technical assistance.

The Secretary is authorized to provide, either directly or by contract or other arrangements, technical assistance to private new community developers and State land development agencies, or State and local public bodies and agencies to assist them in connection with planning and carrying out new community development programs. (Pub. L. 91–609, title VII, § 719, Dec. 31, 1970, 84 Stat. 1800.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 4527 of this title.

§ 4521. Special planning assistance; authorization of appropriations.

(a) The Secretary may, until June 30, 1975, enter into agreements with private new community developers and State land development agencies to provide financial asistance, in amounts, not exceeding two-thirds of the estimated cost of such work, for planning new community development programs, including planning work which he determines will have special value in assuring that new community development programs (1) will be fully responsive to social or environmental problems related to the public purposes of new community development, or (2) will adequately provide for, or encourage the use of, new or advanced technology in support of program objectives.

(b) The Secretary shall enter into agreements under this section only with respect to new community development programs which had been approved or are being actively considered for approval, having met such initial feasibility criteria as the Secretary may have prescribed, and, in the case of private new community developers, only with respect to planning work which the Secretary determines is in excess of that which would ordinarily be needed to establish final market, financial, and engineering feasibility for programs or projects of similar size and scope not subject to the special purposes of this part. The financial assistance extended pursuant to such agreements shall be subject to such terms and conditions, which, in the case of private new community developers, may include provisions for repayment where appropriate, as the Secretary may prescribe.

(c) There are authorized to be appropriated for financial assistance under this section not to exceed $5,000,000, which limit shall be increased by $5,000,000 on July 1, 1971. Any amount appropriated under this section shall remain available until expended. (Pub. L. 91–609, title VII, § 720, Dec. 31, 1970, 84 Stat. 1800.)

§ 4522. Fees and charges.

The Secretary is authorized to establish and collect fees for guarantees under this part, and may make such charges in connection with guarantees, loans, and technical and other assistance under this part as he considers reasonable for the analysis of applications, appraisals, inspections, and other activities related to such assistance. On or before March 1, 1973, the Secretary shall make a report to the Congress concerning the fees and charges for guarantees under this part that he estimates will be adequate to provide income sufficient for a self-supporting guarantee program and concerning the relationship of other charges to costs incurred under this part. (Pub. L. 91–609, title VII, § 721, Dec. 31, 1970, 84 Stat. 1801.)

§ 4523. Encouragement of small builders.

The Secretary shall adopt such requirements as he deems necessary to assure that new community assistance under this part will (1) help maintain a diversified, local homebuilding industry; (2) increase the capability of all segments of the homebuilding industry, including both small and large producers, to participate, through an increased supply of building sites at reasonable costs and through improved technology, in producing the needed, large volume of well-designed, inexpensive housing; and (3) encourage broad participation by the homebuilding industry, particularly small builders. (Pub. L. 91–609, title VII, § 722, Dec. 31, 1970, 84 Stat. 1801.)

§ 4524. New community demonstration projects.

Upon specific authorization by the President and under applicable Federal law respecting the use of federally owned lands, the Secretary, utilizing funds made available for the purpose by the Congress, is authorized to plan and carry out large-scale projects demonstrating the development of new communities, which shall be designed to contribute to the achievement of the purposes of this part and serve as models for new community developments which could feasibly be carried out by other public and private developers. (Pub. L. 91–609, title VII, § 723, Dec. 31, 1970, 84 Stat. 1801.)

§ 4525. Real property taxation.

Nothing in this part shall be construed to exempt any real property that may be acquired and held by the Secretary as a result of the exercise of lien or subrogation rights from real property taxation to the same extent, according to its value, as other real property is taxed. (Pub. L. 91–609, title VII, § 724, Dec. 31, 1970, 84 Stat. 1801.)

§ 4526. Audit by General Accounting Office; records, access.

Insofar as they relate to any guarantees, loans, or grants made pursuant to this part, the financial transactions of recipients of Federal assistance may be audited by the General Accounting Office under such rules and regulations as may be prescribed by the Comptroller General of the United States. The representatives of the General Accounting Office shall have access to all books, accounts, records, reports, files and all other papers, things, or property belonging to or in use by such recipients pertaining to such financial transactions and necessary to facilitate the audit. (Pub. L. 91–609, title VII, § 725, Dec. 31, 1970, 84 Stat. 1801.)

§ 4527. General powers of Secretary.

In the performance of, and with respect to, the functions, powers, and duties vested in him by this part, the Secretary, in addition to any authority otherwise vested in him, shall—

(1) have the functions, powers, and duties (including the authority to issue rules and regulations) set forth in section 1749a, except subsections (c)(2), (c)(4), (d), and (f), of Title 12: *Provided*, That subsection (a)(1) of section 1749a of Title 12 shall not apply with respect to functions, powers, and duties under section 4520 of this title;

(2) have the power, notwithstanding any other provision of law, in connection with any assistance under this part, whether before or after any default, to provide by contract for the extinguishment upon default of any redemption, equitable, legal, or other right, title, or interest of the private new community developer or State land development agency in any mortgage, deed, trust, or other instrument held by or on behalf of the Secretary for the protection of the security interests of the United States; and

(3) have the power to foreclose on any property or commence any action to protect or enforce any right conferred upon him by law, contract, or other agreement, and bid for and purchase at any foreclosure or other sale any property in connection with which he has provided assistance pursuant to this part. In the event of any such acquisition, the Secretary may, notwithstanding any other provision of law relating to the acquisition, handling, or disposal of real property by the United States, complete, administer, remodel and convert, dispose of, lease, and otherwise deal with, such property. Notwithstanding any other provision of law, the Secretary shall also have power to pursue to final collection by way of compromise or otherwise all claims acquired by him in connection with any security, subrogation, or other rights obtained by him in administering this part. (Pub. L. 91–609, title VII, § 726, Dec. 31, 1970, 84 Stat. 1801.)

§ 4528. Technical and conforming provisions.

No bonds, debentures, notes, or other obligations shall be guaranteed under title IV of the Housing and Urban Development Act of 1968 after December 31, 1970, except pursuant to an offer or commitment to guarantee, or a project approval, made before that date: *Provided*, That a new community developer whose new community development project has, as of December 31, 1970, been approved by the Secretary under title IV shall be eligible with respect to obligations thereafter issued by him for guarantee assistance as authorized either by title IV or by this part, and such guarantee assistance may be given without a further determination by the Secretary under sections 4513 and 4517(a) of this title. If the Secretary finds that an applicant for title IV assistance has submitted complete financial and internal development plans and related materials pursuant to section 404 of such title IV, or major elements of such plans or materials, the Secretary may accept such plans and materials or major elements, respectively, as fully or partially satisfying the requirement under this part for the submission of a new community development program. All receipts, funds, or other assets and all liabilities of the revolving fund established pursuant to section 407 of the Housing and Urban Development Act of 1968 (including liabilities arising under guarantees made pursuant to such title IV and this section) shall become and be assets and liabilities of the revolving fund established pursuant to this part, as if such assets and liabilities had been received or incurred pursuant to this part, and shall be paid over, held, and accounted for accordingly. (Pub. L. 91–609, title VII, § 727(a), Dec. 31, 1970, 84 Stat. 1802.)

REFERENCES IN TEXT

Title IV of Housing and Urban Development Act of 1968 (Pub. L. 90–448, Aug. 1, 1968, 82 Stat. 476) and sections 404 and 407 of such Act, referred to in subsec. (a), are classified to sections 3901 et seq., 3903, and 3906 of this title, respectively.

§ 4529. Labor standards.

All laborers and mechanics employed by contractors or subcontractors in land development assisted under this part shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended. No assistance shall be extended under this part for any land development without first obtaining adequate assurance that these labor standards will be maintained upon the construction work involved in such program. The Secretary of Labor shall have, with respect to the labor standards specified in this section, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950, and section 276c of Title 40. (Pub. L. 91–609, title VII, § 727(f), Dec. 31, 84 Stat. 1803.)

REFERENCE IN TEXT

The Davis-Bacon Act, as amended, referred to in the text, is classified to sections 276a to 276a—5 of Title 40, Public Buildings, Property, and Works.

Reorganization Plan Numbered 14 of 1950, referred to in the text, is set out in the Appendix to Title 5, Government Organization and Employees.

§ 4530. Interest on obligations as gross income.

With respect to any obligation issued by or on behalf of any State land development agency for which the issuer has elected to receive the benefits of the guarantees provided under this part, the interest paid on such obligation and received by the purchaser thereof (or his successor in interest) shall be

included in gross income for the purposes of chapter 1 of Title 26. (Pub. L. 91–609, title VII, § 727(g), Dec. 31, 1970, 84 Stat. 1803.)

§ 4531. Joint funding.

Funds made available under any Federal assistance program for projects or activities approved as part of, or pursuant to, a new community development program may be used jointly with funds made available for such projects or activities under any other Federal assistance program, subject to regulations prescribed by the President. Such regulations may include provisions for common technical or administrative requirements where varying or conflicting provisions of law would otherwise apply, for establishing joint management funds and common non-Federal shares, and for special agreements, or delegations of authority, among different Federal agencies in connection with the supervision or administration of assistance. Such regulations shall in any case include appropriate criteria and procedures to assure that any special authorities conferred, which are not otherwise provided for by law, shall be employed only as necessary to promote effective and efficient administration and in a manner consistent with the protection of the Federal interest and program purposes or statutory requirements of a substantive nature. For purposes of this sectio the term "Federal assistance program" has the sam meaning as under the Intergovernmental Coopers tion Act of 1968. (Pub. L. 91–609, title VII, § 72 Dec. 31, 1970, 84 Stat. 1803.)

REFERENCES IN TEXT

The Intergovernmental Cooperation Act of 1968, r ferred to in the text, is classified to chapter 52 of th title.

§ 4532. Community Development Corporation.

(a) Establishment.

There is hereby created within the Department Housing and Urban Development a body corpora to be known as the Community Development Co poration which shall carry out its functions subje to the direction and supervision of the Secretary.

(b) Membership; compensation and travel expenses.

The Corporation shall have a Board of Directo (hereinafter referred to as the "Board") which sh consist of five members as follows:

(1) The Secretary, who shall be Chairman the Board;

(2) one person, to be appointed by the Preside by and with the advice and consent of the Sena who shall serve at the pleasure of the Presider shall be the General Manager of the Corporatic serving as its chief executive officer under t Board's general direction, and shall receive co pensation at the rate provided for positions at le IV of the Executive Schedule (section 5315 of Ti 5); and

(3) three persons, to be appointed by the Secr tary who shall serve at his pleasure, but not m than one such person shall be selected from amo officers or employees of the Department of Housi and Urban Development.

Members of the Board who are regular, full-time officers or employees of the Federal Government shall receive no additional compensation for their services as Board members. Other members shall receive for their services as members, when engaged in the performance of their duties, the per diem equivalent to the rate for level IV of the Federal Executive Salary Schedule under section 5315 of Title 5. Each member of the Board shall be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of such Title for persons in the Government service employed intermittently.

(c) Functions.

The functions of the Secretary with respect to guarantees and loans in aid of new community development under this part shall be administered through the Community Development Corporation, and the Corporation shall perform such additional functions, powers, and duties as the Secretary may prescribe from time to time. (Pub. L. 91–609, title VII, § 729, Dec. 31, 1970, 84 Stat. 1804.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 4512 of this title.

THE COUNCIL ON ENVIRONMENTAL QUALITY
STATEMENT ON PROPOSED FEDERAL ACTIONS AFFECTING THE ENVIRONMENT

36 FED. REG. NO. 79 (April 23, 1971)

COUNCIL ON ENVIRONMENTAL QUALITY

STATEMENTS ON PROPOSED FEDERAL ACTIONS AFFECTING THE ENVIRONMENT

FEDERAL REGISTER, VOL. 36, NO. 79

FRIDAY, APRIL 23, 1971

Guidelines

1. *Purpose.* This memorandum provides guidelines to Federal departments, agencies, and establishments for preparing detailed environmental statements on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment as required by section 102(2)(C) of the National Environmental Policy Act (Public Law 91-190) (hereafter "the Act"). Underlying the preparation of such environmental statements is the mandate of both the Act and Executive Order 11514 (35 F.R. 4247) of March 4, 1970, that all Federal agencies, to the fullest extent possible, direct their policies, plans and programs so as to meet national environmental goals. The objective of section 102(2)(C) of the Act and of these guidelines is to build into the agency decision making process an appropriate and careful consideration of the environmental aspects of proposed action and to assist agencies in implementing not only the letter, but the spirit, of the Act. This memorandum also provides guidance on implementation of section 309 of the Clean Air Act, as amended (42 U.S.C. 1857 et seq.).

2. *Policy.* As early as possible and in all cases prior to agency decision concerning major action or recommendation or a favorable report on legislation that significantly affects the environment, Federal agencies will, in consultation with other appropriate Federal, State, and local agencies, assess in detail the potential environmental impact in order that adverse effects are avoided, and environmental quality is restored or enhanced, to the fullest extent practicable. In particular, alternative actions that will minimize adverse impact should be explored and both the long- and short-range implications to man, his physical and social surroundings, and to nature, should be evaluated in order to avoid to the fullest extent practicable undesirable consequences for the environment.

3. *Agency and OMB procedures.* (a) Pursuant to section 2(f) of Executive Order 11514, the heads of Federal agencies have been directed to proceed with measures required by section 102(2)(C) of the Act. Consequently, each agency will establish, in consultation with the Council on Environmental Quality, not later than June 1, 1970 (and, by July 1, 1971, with respect to requirements imposed by revisions in these guidelines, which will apply to draft environmental statements circulated after June 30, 1971), its own formal procedures for (1) identifying those agency actions requiring environmental statements, the appropriate time prior to decision for the consultations required by section 102(2)(C), and the agency review process for which environmental statements are to be available, (2) obtaining information required in their preparation, (3) designating the officials who are to be responsible for the statements, (4) consulting with and taking account of the comments of appropriate Federal, State, and local agencies, including obtaining the comment of the Administrator of the Environmental Protection Agency, whether or not an environmental statement is prepared, when required under section 309 of the Clean Air Act, as amended, and section 8 of these guidelines, and (5) meeting the requirements of section 2(b) of Executive Order 11514 for providing timely public information on Federal plans and programs with environmental impact including procedures responsive to section 10 of these guidelines. These procedures should be consonant with the guidelines contained herein. Each agency should file seven (7) copies of all such procedures with the Council on Environmental Quality, which will provide advice to agencies in the preparation of their procedures and guidance on the application and interpretation of the Council's guidelines. The Environmental Protection Agency will assist in resolving any question relating to section 309 of the Clean Air Act, as amended.

(b) Each Federal agency should consult, with the assistance of the Council on Environmental Quality and the Office of Management and Budget if desired, with other appropriate Federal agencies in the development of the above procedures so as to achieve consistency in dealing with similar activities and to assure effective coordination among agencies in their review of proposed activities.

(c) State and local review of agency procedures, regulations, and policies for the administration of Federal programs of assistance to State and local governments will be conducted pursuant to procedures established by the Office of Management and Budget Circular No. A-85. For agency procedures subject to OMB Circular No. A-85 a 30-day extension in the July 1, 1971, deadline set in section 3(a) is granted.

(d) It is imperative that existing mechanisms for obtaining the views of Federal, State, and local agencies on proposed Federal actions be utilized to the extent practicable in dealing with environmental matters. The Office of Management and Budget will issue instructions, as necessary, to take full advantage of existing mechanisms (relating to procedures for handling legislation, preparation of budgetary materials, new procedures, water resource and other projects, etc.).

4. *Federal agencies included.* Section 102(2)(C) applies to all agencies of the Federal Government with respect to recommendations or favorable reports on proposals for (i) legislation and (ii) other major Federal actions significantly affecting the quality of the human environment. The phrase "to the fullest extent possible" in section 102(2)(C) is meant to make clear that each agency of the Federal Government shall comply with the requirement unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible. (Section 105 of the Act provides that "The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.")

5. *Actions included.* The following criteria will be employed by agencies in deciding whether a proposed action requires the preparation of an environmental statement:

(a) "Actions" include but are not limited to:

(i) Recommendations or favorable reports relating to legislation including that for appropriations. The requirement for following the section 102(2)(C) procedure as elaborated in these guidelines applies to both (i) agency recommendations on their own proposals for legislation and (ii) agency reports on legislation initiated elsewhere. (In the latter case only the agency which has primary responsibility for the subject matter involved will prepare an environmental statement.) The Office of Management and Budget will supplement these general guidelines with specific instructions relating to the way in which the section 102(2)(C) procedure fits into its legislative clearance process;

(ii) Projects and continuing activities: directly undertaken by Federal agencies; supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance; involving a Federal lease, permit, license, certificate or other entitlement for use;

(iii) Policy, regulations, and procedure-making.

(b) The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed (and of further actions contemplated). Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases. In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several Government agencies individually make decisions about partial aspects of a major action. The lead agency

should prepare an environmental statement if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action. "Lead agency" refers to the Federal agency which has primary authority for committing the Federal Government to a course of action with significant environmental impact. As necessary, the Council on Environmental Quality will assist in resolving questions of lead agency determination.

(c) Section 101(b) of the Act indicates the broad range of aspects of the environment to be surveyed in any assessment of significant effect. The Act also indicates that adverse significant effects include those that degrade the quality of the environment, curtail the range of beneficial uses of the environment, and serve short-term, to the disadvantage of long-term, environmental goals. Significant effects can also include actions which may have both beneficial and detrimental effects, even if, on balance, the agency believes that the effect will be beneficial. Significant adverse effects on the quality of the human environment include both those that directly affect human beings and those that indirectly affect human beings through adverse effects on the environment.

(d) Because of the Act's legislative history, environmental protective regulatory activities concurred in or taken by the Environmental Protection Agency are not deemed actions which require the preparation of environmental statements under section 102(2)(C) of the Act.

6. *Content of environmental statement.* (a) The following points are to be covered:

(i) A description of the proposed action including information and technical data adequate to permit a careful assessment of environmental impact by commenting agencies. Where relevant, maps should be provided.

(ii) The probable impact of the proposed action on the environment, including impact on ecological systems such as wildlife, fish, and marine life. Both primary and secondary significant consequences for the environment should be included in the analysis. For example, the implications, if any, of the action for population distribution or concentration should be estimated and an assessment made of the effect of any possible change in population patterns upon the resource base, including land use, water, and public services, of the area in question.

(iii) Any probable adverse environmental effects which cannot be avoided (such as water or air pollution, undesirable land use patterns, damage to life systems, urban congestion, threats to health or other consequences adverse to the environmental goals set out in section 101(b) of the Act).

(iv) Alternatives to the proposed action (section 102(2)(D) of the Act requires the responsible agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources"). A rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential. Sufficient analysis of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects.

(v) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. This in essence requires the agency to assess the action for cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations.

(vi) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. This requires the agency to identify the extent to which the action curtails the range of beneficial uses of the environment.

(vii) Where appropriate, a discussion of problems and objections raised by other Federal, State, and local agencies and by private organizations and individuals in the review process and the disposition of the issues involved. (This section may be added at the end of the review process in the final text of the environmental statement.)

(b) With respect to water quality aspects of the proposed action which have been previously certified by the appropriate State or interstate organization as being in substantial compliance with applicable water quality standards, the comment of the Environmental Protection Agency should also be requested.

(c) Each environmental statement should be prepared in accordance with the precept in section 102(2)(A) of the Act that all agencies of the Federal Government "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking which may have an impact on man's environment."

(d) Where an agency follows a practice of declining to favor an alternative until public hearings have been held on a proposed action, a draft environmental statement may be prepared and circulated indicating that two or more alternatives are under consideration.

(e) Appendix 1 prescribes the form of the summary sheet which should accompany each draft and final environmental statement.

7. Federal agencies to be consulted in connection with preparation of environmental statement. A Federal agency considering an action requiring an environmental statement, on the basis of (i) a draft environmental statement for which it takes responsibility or (ii) comparable information followed by a hearing subject to the provisions of the Administrative Procedure Act, should consult with, and obtain the comment on the environmental impact of the action of, Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved. These Federal agencies include components of (depending on the aspect or aspects of the environment):

Advisory Council on Historic Preservation.
Department of Agriculture.
Department of Commerce.
Department of Defense.
Department of Health, Education, and Welfare.
Department of Housing and Urban Development.
Department of the Interior.
Department of State.
Department of Transportation.
Atomic Energy Commission.
Federal Power Commission.
Environmental Protection Agency.
Office of Economic Opportunity.

For actions specifically affecting the environment of their geographic jurisdictions, the following Federal and Federal-State agencies are also to be consulted:

Tennessee Valley Authority.
Appalachian Regional Commission.
National Capital Planning Commission.
Delaware River Basin Commission.
Susquehanna River Basin Commission.

Agencies seeking comment should determine which one or more of the above listed agencies are appropriate to consult on the basis of the areas of expertise identified in Appendix 2 to these guidelines. It is recommended (i) that the above listed departments and agencies establish contact points, which often are most appropriately regional offices, for providing comments on the environmental statements and (ii) that departments from which comment is solicited coordinate and consolidate the comments of their component entities. The requirement in section 102(2)(C) to obtain comment from Federal agencies having jurisdiction or special expertise is in addition to any specific statutory obligation of any Federal agency to coordinate or consult with any other Federal or State agency. Agencies seeking comment may establish time limits of not less than thirty (30) days for reply, after which it may be presumed, unless the agency consulted requests a specified extension of time, that the agency consulted has no comment to make. Agencies seeking comment should endeavor to comply with requests for extensions of time of up to fifteen (15) days.

8. *Interim EPA procedures for implementation of section 309 of the Clean Air Act, as amended.* (a) Section 309 of the Clean Air Act, as amended, provides:

SEC. 309. (a) The Administrator shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this Act or other provisions of the authority of the Administrator, contained in any (1) legislation proposed by any Federal department or agency, (2) newly authorized Federal projects for construction and any major Federal agency action (other than a project for construction) to which section 102(2)(C) of Public Law 91-190 applies, and (3) proposed regulations published by any department or agency of the Federal Government. Such written comment shall be made public at the conclusion of any such review.

(b) In the event the Administrator determines that any such legislation, action, or regulation is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality.

(b) Accordingly, wherever an agency action related to air or water quality, noise abatement and control, pesticide regulation, solid waste disposal, radiation criteria and standards, or other provisions of the authority of the Administrator if the Environmental Protection Agency is involved, including his enforcement authority, Federal agencies are required to submit for review and comment by the Administrator in writing: (i) proposals for new Federal construction projects and other major Federal agency actions to which section 102(2)(C) of the National Environmental Policy Act applies and (ii) proposed legislation and regulations, whether or not section 102(2)(C) of the National Environmental Policy Act applies. (Actions requiring review by the Administrator do not include litigation or enforcement proceedings.) The Administrator's comments shall constitute his comments for the purposes of both section 309 of the Clean Air Act and section 102(2)(C) of the National Environmental Policy Act. A period of 45 days shall be allowed for such review. The Administrator's written comment shall be furnished to the responsible Federal department or agency, to the Council on Environmental Quality and summarized in a notice published in the FEDERAL REGISTER. The public may obtain copies of such comment on request from the Environmental Protection Agency.

9. *State and local review.* Where no public hearing has been held on the proposed action at which the appropriate State and local review has been invited, and where review of the environmental impact of the proposed action by State and local agencies authorized to develop and enforce environmental standards is relevant, such State and local review shall be provided as follows:

(a) For direct Federal development projects and projects assisted under programs listed in Attachment D of the Office of Management and Budget Circular

(b) Where these procedures are not appropriate and where a proposed action affects matters within their jurisdiction, review of the draft environmental statement on a proposed action by State and local agencies authorized to develop and enforce environmental standards and their comments on the environmental impact of the proposed action may be obtained directly or by distributing the draft environmental statement to the appropriate State, regional and metropolitan clearinghouses unless the Governor of the State involved has designated some other point for obtaining this review.

10. *Use of statements in agency review processes; distribution to Council on Environmental Quality; availability to public.* (a) Agencies will need to identify at what stage or stages of a series of actions relating to a particular matter the environmental statement procedures of this directive will be applied. It will often be necessary to use the procedures both in the development of a national program and in the review of proposed projects within the national program. However, where a grant-in-aid program does not entail prior approval by Federal agencies of specific projects the view of Federal, State, and local agencies in the legislative process may have to suffice. The principle to be applied is to obtain views of other agencies at the earliest feasible time in the development of program and project proposals. Care should be exercised so as not to duplicate the clearance process, but when actions being considered differ significantly from those that have already been reviewed pursuant to section 102(2)(C) of the Act an environmental statement should be provided.

(b) Ten (10) copies of draft environmental statements (when prepared), ten (10) copies of all comments made thereon (to be forwarded to the Council by the entity making comment at the time comment is forwarded to the responsible agency), and ten (10) copies of the final text of environmental statements (together with all comments received thereon by the responsible agency from Federal, State, and local agencies and from private organizations and individ-

able to the President). It is important that draft environmental statements be prepared and circulated for comment and furnished to the Council early enough in the agency review process before an action is taken in order to permit meaningful consideration of the environmental issues involved. To the maximum extent practicable no administrative action (i.e., any proposed action to be taken by the agency other than agency proposals for legislation to Congress or agency reports on legislation) subject to section 102(2)(C) is to be taken sooner than ninety (90) days after a draft environmental statement has been circulated for comment, furnished to the Council and, except where advance public disclosure will result in significantly increased costs of procurement to the Government, made available to the public pursuant to these guidelines; neither should such administrative action be taken sooner than thirty (30) days after the final text of an environmental statement (together with comments) has been made available to the Council and the public. If the final text of an environmental statement is filed within ninety (90) days after a draft statement has been circulated for comment, furnished to the Council and made public pursuant to this section of these guidelines, the thirty (30) day period and ninety (90) day period may run concurrently to the extent that they overlap.

(c) With respect to recommendations or reports on proposals for legislation to which section 102(2)(C) applies, the final text of the environmental statement and comments thereon should be available to the Congress and to the public in support of the proposed legislation or report. In cases where the scheduling of congressional hearings on recommendations or reports on proposals for legislation which the Federal agency has forwarded to the Congress does not allow adequate time for the completion of a final text of an environmental statement (together with comments), a draft environmental statement may be furnished to the Congress and made available to the public pending transmittal of the comments as received and the final text.

out observing the provisions of these guidelines concerning minimum periods for agency review and advance availability of environmental statements, the Federal agency proposing to take the action should consult with the Council on Environmental Quality about alternative arrangements. Similarly, where there are overriding considerations of expense to the Government or impaired program effectiveness, the responsible agency should consult the Council concerning appropriate modifications of the minimum periods.

(e) In accord with the policy of the National Environmental Policy Act and Executive Order 11514 agencies have a responsibility to develop procedures to insure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties. These procedures shall include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information, including information on alternative courses of action. Agencies which hold hearings on proposed administrative actions or legislation should make the draft environmental statement available to the public at least fifteen (15) days prior to the time of the relevant hearings except where the agency prepares the draft statement on the basis of a hearing subject to the Administrative Procedure Act and preceded by adequate public notice and information to identify the issues and obtain the comments provided for in sections 6–9 of these guidelines.

(f) The agency which prepared the environmental statement is responsible for making the statement and the comments received available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C., sec. 552), without regard to the exclusion of interagency memoranda when such memoranda transmit comments of Federal agencies listed in section 7 of these guidelines upon the environmental impact of proposed actions subject to section 102(2)(C).

(g) Agency procedures prepared pur-

projects and projects assisted under programs listed in Attachment D of the Office of Management and Budget Circular No. A-95, review of draft environmental statements by State and local governments will be through procedures set forth under Part I of Circular No. A-95.

thereon by the responsible agency from Federal, State, and local agencies and from private organizations and individuals) shall be supplied to the Council on Environmental Quality in the Executive Office of the President (this will serve as making environmental statements avail-

to the Congress and made available to the public pending transmittal of the comments as received and the final text.

(d) Where emergency circumstances make it necessary to take an action with significant environmental impact with-

pact of proposed actions subject to section 102(2)(C).

(g) Agency procedures prepared pursuant to section 3 of these guidelines shall implement these public information requirements and shall include ar-

rangements for availability of environmental statements and comments at the head and appropriate regional offices of the responsible agency and at appropriate State, regional, and metropolitan clearinghouses unless the Governor of the State involved designates some other point for receipt of this information.

11. *Application of section 102(2)(C) procedure to existing projects and programs.* To the maximum extent practicable the section 102(2)(C) procedure should be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970. Where it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.

12. *Supplementary guidelines, evaluation of procedures.* (a) The Council on Environmental Quality after examining environmental statements and agency procedures with respect to such statements will issue such supplements to these guidelines as are necessary.

(b) Agencies will continue to assess their experience in the implementation of the section 102(2)(C) provisions of the Act and in conforming with these guidelines and report thereon to the Council on Environmental Quality by December 1, 1971. Such reports should include an identification of the problem areas and suggestions for revision or clarification of these guidelines to achieve effective coordination of views on environmental aspects (and alternatives, where appropriate) of proposed actions without imposing unproductive administrative procedures.

RUSSELL E. TRAIN,
Chairman.

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THE COUNCIL ON ENVIRONMENTAL QUALITY
MEMORANDUM FOR AGENCY AND GENERAL COUNSEL LIAISON
ON NEPA MATTERS (May 16, 1972)

Council on Environmental Quality

(The following is the full text of a memorandum making recommendations to improve agency NEPA procedures issued by CEQ May 16, 1972.)

MEMORANDUM FOR AGENCY AND GENERAL COUNSEL LIAISON ON NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) MATTERS

Subject: Recommendations for Improving Agency NEPA Procedures.

In response to a variety of agency inquiries, we are circulating the attached recommendations for improving agency NEPA procedures, taking particular account for judicial decisions construing NEPA. In a previous memorandum dated February 29, 1972 (a copy of which is also attached) Chairman Train drew attention to the continuing need for reviewing and improving agency NEPA procedures and made two basic recommendations:

1. "In particular we are interested in finding ways of consolidating numbers of impact statements into fewer but broader and more meaningful reviews."

2. "On the matter of applying the NEPA statutory language 'major Federal actions significantly affecting the quality of the human environment' to your particular agency programs and pinpointing the precise timing of the NEPA review and interagency consultations called for, your agency procedures must provide the specifics within the framework of the statute and our Guidelines. These procedures are important both in helping to identify the types of action on which impact statements are likely to be necessary and those where statements are not called for."

In addition to agency inquiries about the effect of court decisions, a number of agencies have raised procedural questions relating to the interpretation of existing provisions of the CEQ Guidelines which we feel deserve clarification in a general memorandum.

Agencies should consider the extent to which the issues discussed in this memorandum and Chairman Train's memorandum of February 29 are adequately dealt with under their existing NEPA procedures. In many cases, actual revision of NEPA procedures may not be necessary. In other cases, procedures or practices may have to be modified. Agencies are requested to inform the Council of the action they take in response to these recommendations.

TIMOTHY ATKESON,
General Counsel.

RECOMMENDATIONS FOR IMPROVING AGENCY NEPA PROCEDURES

A. Substantive Issues: The Required Content of Environmental Statements.

1. Duty to Disclose Full Range of Impacts. Court decisions under the National Environmental Policy Act have established that the "detailed" statement referred to in section 102 of the Act must thoroughly explore all known environmental consequences of and alternatives to major proposed actions even though this may lead to consideration of effects and options outside the agency's actual control.

Viewed as simply an application of NEPA's "full disclosure" requirement, this basic principle is meant to ensure that relevant officials and the public are alerted to the environmental impact of Federal agency action. See *EDF v. Corps of Engineers*, 2 ERC 1260, 1267 (E.D. Ark. 1971).

Furthermore, the range of impacts which must be considered cannot be limited to the traditional area of agency jurisdiction or expertise. NEPA in essence adds a new mandate to the enabling legislation of all agencies, requiring the development of environmental awareness for the full range of impacts of proposed agency action. By failing to discuss reasonably foreseeable impacts or by discussing those impacts in a perfunctory manner, an agency defeats the purpose of the statement and lays itself open to the charge of non-compliance with the Act. See, e.g., *Calvert Cliffs* v. *AEC*, 2 ERC 1779, 1782 (D.C. Cir. 1971) (purpose of statement is to aid agency in its decision and to fully inform other interested agencies and the public of environmental consequences); *EDF v. Corps of Engineers*, 2 ERC 1260, 1267 (E.D. Ark., 1971) (statement must alert President, CEQ, public, and Congress to all known possible environmental consequences); *EDF v. Hardin*, 2 ERC 1425, 1426 (D D.C. 1971) (agency must undertake research in planning stage adequate to expose potential environmental impact); *Ely v. Velde*, 3 ERC 1286 (4th Cir. 1971) (genuine rather than perfunctory compliance with NEPA requires agency to explicate fully its course of inquiry, its analysis and its reasoning); *NRDC v. Morton*, 3 ERC 1558, 1562, (D.C. Cir. 1972) (statement is for the guidance of ultimate decisionmakers —Congress and the President—as well as agency, and must provide discussion of all reasonable alternatives); *Greene County v. FPC*, 3 ERC 1595, 1600 (2d Cir. 1972) (statement must present "a single coherent and comprehensive environmental analysis").

In order to ensure full compliance with this requirement it is desirable that agencies develop in advance a list of the typical impacts of those classes of actions that the agency regularly takes. In developing such a list, agencies are reminded that impacts include not only direct effects, but also secondary effects such as "the effect of any possible change in population patterns upon the resource base, including land use, water, and public services, of the area in question." CEQ Guidelines § 6(a)(ii).

By giving consideration to such impacts agencies should also be able to develop an increasingly specific set of standards for determining what constitutes "major," environmentally "significant" actions. Application of such standards to the normal range of agency actions will make possible earlier and more accurate identification of actions subject to the § 102 requirement.

Recommendation #1: Agencies should develop a list of the full range of impacts likely to be involved in the typical types of actions they undertake. This will require a listing both of typical agency actions affecting the environment, see, e.g., Forest Service NEPA procedures, 36 *Fed. Reg.* 23670 (1971), as well as a list of related, potential impacts, see, e.g., Water Resources Council "Proposed Principles . . . ," 36 *Fed. Reg.* 24159–62 (1971). This description of potential impacts will help guide officials responsible for preparation of impact statements by ensuring that critical impacts are not overlooked and by making possible earlier, more accurate identification of "major," environmentally "significant" actions.

2. Duty to "Balance" Advantages and Disadvantages of the Proposed Action.

Inherent in the duty imposed on any agency by NEPA to promote environmental quality is the obligation to weigh the possible environmental effects of a proposal against the effects on other public values the agency is mandated to consider. If the environmental effects are adverse, the agency must consider whether they outweigh the benefits of the proposal in deciding whether to go ahead. This implicit requirement is confirmed by the directive of Section 102(2)(B) that agencies develop methods for giving "presently unquantified environmental amenities and values . . . appropriate consideration in decisionmaking along with economic and technical considerations."

However, NEPA does not specify whether this balancing of environmental and other considerations must be spelled out in the environmental impact statement under Section 102(2)(C). Each of the five items expressly required to be included in the statement relates to environmental effects—except the third, which does not specify what type of information should be given about "alternatives to the proposed action." From the bare language of Section 102(2)(C), it is not wholly clear whether the 102 statement is to catalog only the environmental effects of the proposed action and of alternatives, or whether the statement is to discuss *all* of the important considerations bearing on the wisdom of the proposed action.

The legislative history suggests that Congress did expect the 102 statement to record the agency's trade-offs of competing values. In explaining the bill on the Senate floor, designed to insure that in instances where a Senator Jackson said:

Subsection 102(c) establishes a procedure proposed major Federal action would have a significant impact on the environment that the impact has in fact been considered, that any adverse effects which cannot be avoided are justified by some other *stated* consideration of national policy, that short-term uses are consistent with long-term productivity, and that any irreversible and irretrievable commitments of resources are warranted. 115 *Cong. Rec.* 29055 (Oct. 8, 1969). (Emphasis added.)

This interpretation is supported by several statements in court decisions. In the *Calvert Cliffs* case the court stressed the necessity for "balancing" under NEPA and the role of the 102 statement in showing how the balancing with done:

In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and "systematic" balancing analysis in each instance.

To insure that the balancing analysis is carried out and given full effect, Section 102 (2)(C) requires that responsible officials of all agencies prepare a "detailed statement" covering the impact of particular actions on the environment, the environmental costs which might be avoided, and alternative measures which might alter the cost benefit equation. 2 ERC at 1781-82.

Similarly, in *Natural Resources Defense Council* v. *Morton*, the court observed that:

The impact statement provides a basis for (a) evaluation of the benefits of the proposed project in light of its environmental risks, and (b) comparison of the net balance for the proposed project with the environmental risk presented by alternative courses of action. 3 ERC at 1561.

These judicial comments do not, however, detract from the *primary* purpose of the 102 statement: the assessment of the environmental effects of possible actions. NEPA was enacted out of a concern that environmental considerations were not being fully canvassed before action, and the purpose of Section 102(2)(C) is primarily to require a "detailed statement" of environmental effects. Where an agency's proposal entails adverse environmental consequences, the 102 statement must identify the countervailing interests that would support a decision to go ahead. This does not mean that the statement may be used as a promotional document in favor of the proposal, at the expense of a thorough and rigorous analysis of environmental risks. In most cases it may be impossible and unnecessary to discuss the countervailing interests in the same detail as environmental factors. The court in the *Morton* case observed that "the consideration of pertinent alternatives requires a weighing of numerous matters, such as economics, foreign relations [and] national security . . ." 3 ERC at 1561. A detailed discussion of each of these subjects could require as much space as the environmental analysis itself, destroying the focus of the 102 statement and undercutting the purpose of NEPA. What is necessary is a succinct explanation of the factors to be balanced in reaching a decision, thus altering the agency decisionmaker, as well as the President, Congress, and the public to the nature of the interests that are being served at the expense of environmental values.

Recommendation #2: Wherever adverse environmental effects are found to be involved in the proposed action, the impact statement should indicate what other interests and considerations of Federal policy might be found to justify those effects. The statement should also indicate the extent to which these stated countervailing benefits could be realized by following reasonable alternatives to the proposed action that would avoid some or all of the adverse environmental effects. In this connection, agencies that prepare cost-benefit analyses of proposed actions should attach such analyses to the environmental impact statement.

2. Duty to Consider Opposing Views.

In *Committee for Nuclear Responsibility* v. *Seaborg*, 3 ERC 1126 (D.C. Cir. 1971), the Court of Appeals considered the duty to discuss opposing views under NEPA. The Court observed that in order for the 102 statement to meet adequately the "full disclosure" requirement, it must "set forth the opposing views" on significant environmental issues raised by the proposal. To omit from the statement any reference whatever to such views would be "arbitrary and impermissible." Again, however, the court noted that "only *responsible* views need be included." What is required is "a meaningful reference that identifies the problem at hand" for the agency decisionmaker. 3 ERC at 1129.

An earlier district court opinion stressed this requirement in even stronger terms:

Where experts, or concerned public or private organizations, or even ordinary lay citizens, bring to the attention of the responsible agency environmental impacts which they contend will result from the proposed agency action, then the § 102 statement should set forth these contentions and opinions, even if the responsible agency finds no merit in them whatsoever. Of course, the § 102 statement can and should also contain the opinion of the responsible agency with respect to all such viewpoints. The record should be complete. *EDF v. Corps of Engineers*, 2 ERC 1260, 1267 (E.D. Ark. 1971).

Again the relevance of this requirement for agency NEPA procedures is primarily a matter of ensuring that opposing views are fairly treated and discussed in the process of preparing draft and final statements.

Recommendation #3: Agencies should make an effort to discover and discuss all major points of view in the draft statement itself. Where opposing professional views and responsible opinions have been overlooked in the draft statement and are brought to the agency's attention through the commenting process, the agency should review the positive and negative environmental effects of the action in light of those views and should make a meaningful reference in the final statement to the existence of any responsible opposing view not adequately discussed in the draft statement with respect to adverse environmental effects, indicating the agency's response to the issues raised. *All substantive comments received on the draft should be attached to the final statement, whether or not each such comment is thought to merit individual discussion by the agency in the text of the statement.* At the same time that copies are sent to the Council, copies of final statements, with comments attached, should also be sent to all entities—Federal, State and local agencies, private organizations and individual—that made substantive comments on the draft statement, thus informing such entities of the agency's disposition of their arguments.

4. *Reasonable "Alternatives" to the Proposed Action.* The recent decision in *NRDC* v. *Morton*, *supra*, discussed the "full disclosure" requirement in relation to the requirement that agencies consider the "alternatives" to the proposed action. See also *EDF* v. *Corps of Engineers*, 2 ERC 1260, 1269 (E.D. Ark. 1971) (discussing respects in which consideration of alternatives in proposed dam project was legally deficient). The most significant aspect of the Morton decision is the court's conclusion that all alternatives reasonably available to the Government as a whole must be discussed—even if some of those alternatives are outside the control of the agency preparing the statement. Discussion of such alternatives is required in order to guide the decision at hand as well as to inform the public of the issues and to guide the decisions of the President and Congress.

The court in this case was careful, however, to emphasize that it was not requiring the impossible. "A rule of reason is implicit in this aspect of the law, as it is in the requirement that the agency provide a statement concerning the opposing views that are responsible." 3 ERC at 1561 (citing *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 3 ERC 1126, 1128-29 (D.C. Cir. 1971)). What NEPA requires is "information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned." 3 ERC at 1563. Detailed discussion is not required of alternatives that "are deemed only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies." 3 ERC at 1564. And the agencies need not indulge in "'crystal ball' inquiry" in assessing the effects of alternatives. The agency will have taken the "hard look" required by NEPA if it has discussed the reasonably foreseeable effects with a thoroughness commensurate with their severity and the significance of the action.

The relevance of this decision for agency NEPA procedures is primarily one of ensuring that the reference to "alternatives" is interpreted consistently with applicable judicial opinions: In most cases a judicial interpretation of a statutory term does not require an amendment of related documents employing the term. Presumably the term will be applied and interpreted by an agency in accordance with governing judicial decisions. However, in view of the importance of the *Morton* decision and in view of the conflicting practices of some agencies prior to the decision, it seems preferable to expand the reference to "alternatives" in agency NEPA procedures at least to the extent of indicating that all reasonable alternatives will be evaluated, even though they may not all lie within the agency's control. Such a revision would not add in any way to an agency's current legal responsibilities, and might ensure that officials preparing the statements keep in mind the proper scope of alternatives they must consider.

Recommendation No. 4: Agencies should indicate that all reasonable alternatives and their environmental impacts are to be discussed, including those not within the authority of the agency. Examples of specific types of alternatives that should be considered in connection with specific kinds of actions should be given where possible. Such examples should include, where relevant:

(1) the alternative of taking no action;

(2) alternatives requiring actions of a significantly different nature which would provide similar benefits with different environmental impacts (e.g., a fossil fuel v. a nuclear power plant);

(3) alternatives related to different designs or details of the proposed action, which would present different environmental impacts (e.g., pollution control equipment on a nuclear plant).

In each case, the analysis of alternatives should be sufficiently detailed and rigorous to permit independent and comparative evaluation of the benefits, costs and environmental risks of the proposed action and each alternative.

B. *Procedural Issues: Preparation and Circulation of Environmental Statements.*

1. *The "Pre-Draft" Stage.*

The issues discussed above with reference to the required content of impact statements necessarily have implications for the procedures that agencies follow in preparing such statements. It has already been noted, for example, that agencies should make every effort to anticipate and discuss all major points of view on the impact of the proposed action in the draft statement itself. A related procedural question concerns the extent to which agencies should formally seek advice from other agencies or members of the public prior to preparing a draft statement.

The CEQ guidelines do not require a formalized "pre-draft" consultation process. Indeed, the reason for requiring a draft statement in the first place was in order to satisfy the "prior consultation" requirement found in § 102 of the Act, which refer only to a "detailed statement." At the same time, however, in order for the draft statement to present an adequate basis for discussion and comment, it must provide a fairly thorough discussion of the impacts of the proposed action and alternatives. Where an agency lacks the expertise for making such an evaluation, it should not hesitate to solicit help on an informal basis from other agencies. Cooperative arrangements of this sort have already been tried in a number of cases. Furthermore, in preparing a draft statement any agency should welcome whatever helpful information may be forthcoming from other agencies or from the public.

In order for such information to be forthcoming, however, agencies would need to develop means of alerting other agencies and interested members of the public to the fact that a draft statement is being prepared. An announcement to this effect, at least with

respect to administrative actions, would serve three useful functions:

(1) it would enable agencies and interested persons with relevant information to make such information available in time for use in the draft statements;

(2) it would provide advance notice of the fact that a draft statement will soon be available for comment;

(3) it would furnish evidence of the point in time in the agency decisionmaking process that the 102 process is initiated.

Recommendation No. 5: Agencies should devise an appropriate early notice system, by which the decision to prepare an impact statement is announced as soon as is practicable after that decision is made. (Compare in this respect the "notice of intent" provisions contained in § 8b of the NEPA procedures of the Environmental Protection Agency and the provisions for early public notice contained in paragraphs 12 and 14 of the NEPA procedures of the Corps of Engineers.) In connection with the development of such a procedure, an agency should consider maintaining a list of statements under preparation, revising the list as additions are made and making the list available for public inspection.

2. *Draft Statement Reference to Underlying Documents.*

The concern that underlies many of the judicial interpretations of the § 102 requirement is one of ensuring that the 102 process provides an adequate opportunity for comment and participation by other agencies as well as interested members of the public.

In addition, the requirement that agencies consider and respond to opposing views suggests that the 102 statement must consist of more than simple assertions about expected environmental impacts; the statement must also reflect the underlying information on which those assertions are based. One of the primary reasons for the injunction issued in *EDF v. Corps of Engineers*, for example, was the discrepancy between assertions made in the impact statement and the evidence on which those assertions were based. See ERC at 1267–69. This problem can largely be avoided by indicating in the draft statement the basis relied on for assertions that are likely to prove controversal or debatable.

Recommendation No. 6: Draft statements should indicate the underlying studies, reports, and other information obtained and considered by the agency in preparing the statement. The agency should also indicate how such documents may be obtained. If the documents are attached to the statement, care should be taken to ensure that the statement remains an essentially self-contained instrument, easily understood by the reader without the need for undue cross-reference.

3. *Publication and Circulation of Statements.*

Section 10 of the CEQ guidelines emphasizes the importance of preparing and circulating draft statements "early enough in the agency review process before an action is taken in order to permit a meaningful consideration of the environmental issues involved. The Council has recently received complaints from a number of agencies, as well as from members of the public, that the minimum periods established for comment and advance availability of statements are being unduly shortened by the delay in actual receipt of the statement. Confusion appears to have developed over whether the time periods are to run from the date the agency mails the statement, or from the date the statement is received by the commenting group.

In accordance with § 10(b) of the CEQ Guidelines, the Council's policy has been to calculate the time periods from the date the statement is received at the Council on Environmental Quality. This date will appear in the Council's weekly publication in the *Federal Register* of statements received during the past week as well as in the monthly 102 Monitor. In order to avoid future confusion on this issue, agencies should ensure that their practices in calculating the minimum time periods reflect this policy.

In many cases, of course, a time lag will still occur between the date of receipt of a statement by the Council and the date of receipt by other agencies or members of the public. To some extent, the problems created by this delay can be avoided by adoption of the early notice device described in Recommendation No. 5, *supra*; such a device would enable potential commenting entities to request direct notification as soon as the draft statement is available. In large measure, though, the problem of providing "timely public information," see Executive Order 11514, § 2(b), requires agency initiative in publicizing the fact that a draft statement is available.

Agencies should not rely solely on the fact of *Federal Register* publication by the Council, but should consider adopting such practices as publication in local newspapers and automatic notification of (and possible automatic distribution of statements to) organizations and individuals that the agency knows are likely to be interested in the project.

Recommendation #7: Agencies should ensure that the minimum periods of review and advance availability of statements are calculated from the date of receipt of the statement by the Council on Environmental Quality, as noted in the Council's *Federal Register* and *102 Monitor* announcements. Agencies should also devise appropriate methods for publicizing the existence of draft statements, for example by publication in local newspapers or by maintaining a list of groups known to be interested in the agency's activities and directly notifying such groups of the existence of a draft statement, or sending them a copy, as soon as it has been prepared.

4. *Actions Which Involve More than One Agency.*

Some confusion has arisen in applying the "lead agency" concept to actions involving more than one agency. Section 5(b) of the CEQ Guidelines provides that the lead agency is "the Federal agency which has primary authority for committing the Federal Government to a course of action with significant environmental impact." This description of "lead agency" was not meant to foreclose the possibility of having a statement prepared jointly by all agencies involved in the program or project. The critical consideration is that the cumulative impacts of the entire project be evaluated, even though each individual agency's action relates only to a part of the project. In some cases it will be most efficient for the agencies involved to agree on a single lead agency to prepare the statement on the entire project, obtaining assistance as necessary from the other agencies involved or from other agencies with relevant expertise. Relevant factors in determining the proper agency to assume such a role include: the time sequence in which the agencies become involved in the project, the magnitude of their respective involvement, and their relative expertise with respect to the project's environmental effects. But these criteria are not absolute and do not foreclose either a cooperatively prepared statement, or advance agreement on designation of a "lead agency" for purposes of ensuring leadership and assigning responsibility. Whichever procedure is followed, the two critical considerations inherent in the provisions of Section 5(b) are: (1) evaluation of the entire project; and (2) preparation of the 102 statement before any of the participating agencies has taken major or irreversible action with respect to the project. See *Upper Pecos Ass'n v. Stans*, 2 ERC 1418 (10th Cir. 1971), *pet'n. for cert. pending*, 40 USLW 3444 No. 71-1133, Mar. 6, 1972).

Recommendation #8: In resolving "lead agency" questions, agencies should consider the possibility of joint preparation of a statement by all agencies involved, as well as designation of a single agency to assume leadership responsibilities in preparing the statement. In either case, the statement should contain an environmental evaluation of the entire project, and should be prepared before major or irreversible actions have been taken by any of the participating agencies.

5. *Statements which Cover More than One Action.*

Related to the above problem, is the problem of determining the proper scope of an environmental impact statement in connection with Federal programs that may involve a multiplicity of individual "actions." Section 10(a) of the CEQ Guidelines makes reference to the need for such "program" statements in certain cases, and this topic was explored in some detail at our agency review sessions in December. In part, the problem requires careful agency attention to the definition of the "action" that the agency is undertaking. If the definition is too broad and the program too far removed from actual implementation, the resulting analysis is likely to be too general to prove useful. On the other hand, an excessively narrow definition is likely to result in impact statements that ignore the cumulative effects of a number of individually small actions, or that come so late in the process that basic program decisions are no longer open for review.

Individual actions that are related either geographically or as logical parts in a chain of contemplated actions may be more appropriately evaluated in a single, program statement. Such a statement also appears appropriate in connection with the issuance of rules, regulations, or other general criteria to govern the conduct of a continuing program, or in the development of a new program that contemplates a number of subsequent actions. Examples of such program statements include the Interior Department's statements on its oil shale program and on its exploitation of geothermal steam under the Geothermal Steam Act of 1970. In all of these cases, the program statement has a number of advantages. It provides an occasion for a more exhaustive consideration of effects and alternatives than would be practicable in a statement on an individual action. It ensures consideration of cumulative impacts that might be slighted in a case-by-case analysis. And it avoids duplicative reconsideration of basic policy questions. The program statement can, of course, be supplemented or updated as necessary to account for changes in circumstances or public policy and to measure cumulative impacts over time.

A program statement will not satisfy the requirements of Section 102, however, if it is superficial or limited to generalities. Where all significant issues cannot be anticipated or adequately treated in connection with the program as a whole, statements of more limited scope will be necessary on subsequent, individual actions in order to complete the analysis.

Recommendation No. 9: In preparing statements, agencies should give careful attention to formulating an appropriate definition of the scope of the project that is the subject of the statement. In many cases, broad program statements will be appropriate, assessing the environmental effects of a number of individual actions on a given geographical area, or the overall impact of a large-scale program or chain of contemplated projects, or the environmental implications of research activities that have reached a stage of investment or commitment to implementation likely to restrict later alternatives. Preparation of program statements in these cases should be in addition to preparation of subsequent statements on major individual actions wherever such actions

have significant environmental impacts that were not fully evaluated in the program statement.

6. Environmental Protective Regulatory Activities.

Section 5(d) of the CEQ guidelines indicates that certain activities of the Environmental Protection Agency do not constitute "actions" for purposes of Section 102. A number of agencies have been confused by the reference in this section to activities "concurred" in by EPA. That reference is not meant to permit agencies to avoid the 102 process merely because the views of the EPA have somehow been secured with respect to environmental aspects of proposed activities.

Additional confusion has been created by recent district court decisions, severely restricting the applicability of § 5(d) with respect to regulatory activities taken by agencies other than the EPA. See *Kalur v. Resor*, 3 ERC 1458 (D. D.C. 1971); *Sierra Club v. Sargent*, 3 ERC 1905 (W.D. Wash. 1972). These cases are being appealed. In addition, legislative proposals have been introduced seeking Congressional clarification of some of the issues involved. In this respect, agencies should be aware of the testimony given by Chairman Train on March 22, 1972 before the Fisheries and Wildlife Conservation Subcommittee of the House Committee on Merchant Marine and Fisheries:

There has been some confusion about the Council's views on the *Kalur* decision and what clarification of NEPA's applicability to environmental protective regulatory activity is necessary. In my opinion, the most narrow possible legislative action, addressed only to the water quality permit program, is desirable. With respect to EPA's other environmental protective regulatory activities we are asking EPA to study and revise its NEPA procedures to state specifically what activities and authorities are included under Section 5(d) of our Guidelines and the rationale for such inclusion.

Recommendation No. 10: Except for the Water Quality permit program, and those activities of the Environmental Protection Agency determined by EPA and the CEQ to justify inclusion under Section 5(d) of the CEQ Guidelines, no other agency actions should be considered as exempted from the requirements of Section 102 under Section 5(d).

EXECUTIVE OFFICE OF THE PRESIDENT,
Washington, D.C., February 29, 1972.

MEMORANDUM FOR HEADS OF AGENCIES

Subject: Continuing Effort to Improve Agency NEPA Procedures

The Council on Environmental Quality Revised Guidelines for the implementation of the National Environmental Policy Act (NEPA) issued April 23, 1971, (36 *Fed. Reg.* 7724) called for your agency's issuance of NEPA procedures applying the Act's requirements to your particular programs. In virtually all cases you have now issued draft or final NEPA procedures for the relevant components of your agency and are operating under them.

Section 12(b) of the Council's Guidelines asked that you make a continuing assessment of your experience in the implementation of NEPA and comment to us in writing by December 1, 1971. In order to respond to those few agencies filing such comments and review general agency experience with NEPA, the staff of the Council, OMB and EPA held extensive review sessions with most Federal agencies in December. At these meetings a number of questions concerning implementation of NEPA were raised informally to which CEQ responded.

We recognize that a continuing effort must be made to improve agency NEPA procedures and have assigned a significant staff effort to monitoring your agency's impact statements with a view to identifying needs for such improvement. We have also invited public comment (36 *Fed. Reg.* 23666, Dec. 11, 1971) on your procedures as an aid to this improvement. In particular we are interested in finding ways of consolidating numbers of impact statements into fewer but broader and more meaningful reviews.

On the matter of applying the NEPA statutory language "major Federal actions significantly affecting the quality of the human environment" to your particular agency programs and pinpointing the precise timing of the NEPA review and interagency consultations called for, your agency procedures must provide the specifics within the framework of the statute and our Guidelines. These procedures are important both in helping to identify the types of action on which impact statements are likely to be necessary and those where statements are not called for. Our staff is available to assist your staff in strengthening your procedures, particularly where you can supply us with the necessary information as to the nature of your activity, the extent of potential environmental impact, and the range of alternatives that ought reasonably to be considered. We expect to start meeting with staffs of individual agencies soon to review possibilities for improvement of procedures to implement NEPA.

We find that the courts are increasingly willing to sustain good faith agency efforts to comply with NEPA and will, from time to time, draw your attention to developments in this area. For the present I am asking our General Counsel to recirculate to your staff who serve as liaison with the Council on NEPA matters the informal guidance we have circulated since issuance of the Council's Revised Guidelines last April.

RUSSELL E. TRAIN,
Chairman.

THE COUNCIL ON ENVIRONMENTAL QUALITY
GUIDELINES FOR PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS

40 C.F.R. § 1500 (1973)

Guidelines for Preparation of Environmental Impact Statements

Title 40—Protection of the Environment

CHAPTER V—COUNCIL ON ENVIRONMENTAL QUALITY

PART 1500—PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS: GUIDELINES

On May 2, 1973, the Council on Environmental Quality published in the FEDERAL REGISTER, for public comment, a proposed revision of its guidelines for the preparation of environmental impact statements. Pursuant to the National Environmental Policy Act (P.L. 91–190, 42 U.S.C. 4321 et seq.) and Executive Order 11514 (35 FR 4247) all Federal departments, agencies, and establishments are required to prepare such statements in connection with their proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. The authority for the Council's guidelines is set forth below in § 1500.1. The specific policies to be implemented by the guidelines is set forth below in § 1500.2.

The Council received numerous comments on its proposed guidelines from environmental groups, Federal, State, and local agencies, industry, and private individuals. Two general themes were presented in the majority of the comments. First, the Council should increase the opportunity for public involvement in the impact statement process. Second, the Council should provide more detailed guidance on the responsibilities of Federal agencies in light of recent court decisions interpreting the Act. The proposed guidelines have been revised in light of the specific comments relating to these general themes, as well as other comments received, and are now being issued in final form.

The guidelines will appear in the Code of Federal Regulations in Title 40, Chapter V, at Part 1500. They are being codified, in part, because they affect State and local governmental agencies, environmental groups, industry, and private individuals, in addition to Federal agencies, to which they are specifically directed, and the resultant need to make them widely and readily available.

Sec.

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Appendix IV State and local agency review of impact statements.

AUTHORITY: National Environmental Act (P.L. 91–190, 42 U.S.C. 4321 et seq.) and Executive Order 11514.

§ 1500.1 Purpose and authority.

(a) This directive provides guidelines to Federal departments, agencies, and establishments for preparing detailed environmental statements on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment as required by section 102(2)(C) of the National Environmental Policy Act (P.L. 91–190, 42 U.S.C. 4321 et. seq.) (hereafter "the Act"). Underlying the preparation of such environmental statements is the mandate of both the Act and Executive Order 11514 (35 FR 4247) of March 5, 1970, that all Federal agencies, to the fullest extent possible, direct their policies, plans and programs to protect and enhance environmental quality. Agencies are required to view their actions in a manner calculated to encourage productive and enjoyable harmony between man and his environment, to promote efforts preventing or eliminating damage to the environment and biosphere and stimulating the health and welfare of man, and to enrich the understanding of the ecological systems and natural resources important to the Nation. The objective of section 102(2)(C) of the Act and of these guidelines is to assist agencies in implementing these policies. This requires agencies to build into their decisionmaking process, beginning at the earliest possible point, an appropriate and careful consideration of the environmental aspects of proposed action in order that adverse environmental effects may be avoided or minimized and environmental quality previously lost may be restored. This directive also provides guidance to Federal, State, and local agencies and the public in commenting on statements prepared under these guidelines.

(b) Pursuant to section 204(3) of the Act the Council on Environmental Quality (hereafter "the Council") is assigned the duty and function of reviewing and appraising the programs and activities of the Federal Government, in the light of the Act's policy, for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto. Section 102(2)(B) of the Act directs all Federal agencies to identify and develop methods and procedures, in consultation with the Council, to insure that unquantified environmental values be given appropriate consideration in decisionmaking along with economic and technical considerations; section 102(2)(C) of the Act directs that copies of all environmental impact statements be filed with the Council; and section 102(2)(H) directs all Federal agencies to assist the Council in the performance of its functions. These provisions have been supplemented in sections 3(h) and (i) of Executive Order 11514 by directions that the Council issue guidelines to Federal agencies for preparation of environmental impact statements and such other instructions to agencies and requests for reports and information as may be required to carry out the Council's responsibilities under the Act.

§ 1500.2 Policy.

(a) As early as possible and in all cases prior to agency decision concerning recommendations or favorable reports on proposals for (1) legislation significantly affecting the quality of the human environment (see §§ 1500.5(i) and 1500.12) (hereafter "legislative actions") and (2) all other major Federal actions significantly affecting the quality of the human environment (hereafter "administrative actions"), Federal agencies will, in consultation with other appropriate Federal, State and local agencies and the public assess in detail the potential environmental impact.

(b) Initial assessments of the environmental impacts of proposed action should be undertaken concurrently with initial technical and economic studies and, where required, a draft environmental impact statement prepared and circulated for comment in time to accompany the proposal through the existing agency review processes for such action. In this process, Federal agencies shall: (1) Provide for circulation of draft environmental statements to other Federal, State, and local agencies and for their availability to the public in accordance with the provisions of these guidelines; (2) consider the comments of the agencies and the public; and (3) issue final environmental impact statements responsive to the comments received. The purpose of this assessment and consultation process is to provide agencies and other decisionmakers as well as members of the public with an understanding of the potential environmental effects of proposed actions, to avoid or minimize adverse effects wherever possible, and to restore or enhance environmental quality to the fullest extent practicable. In particular, agencies should use the environmental impact statement process to explore alternative actions that will avoid or minimize adverse impacts and to evaluate both the long- and short-range implications of proposed actions to man, his physical and social surroundings, and to nature. Agencies should consider the results of their environmental assessments along with their assessments of the net economic, technical and other benefits of proposed actions and use all practicable means, consistent with other essential considerations of national policy, to restore environmental quality as well as to avoid or minimize undesirable consequences for the environment.

§ 1500.3 Agency and OMB procedures.

(a) Pursuant to section 2(f) of Executive Order 11514, the heads of Federal agencies have been directed to proceed with measures required by section 102 (2)(C) of the Act. Previous guidelines of the Council directed each agency to establish its own formal procedures for (1) identifying those agency actions requiring environmental statements, the appropriate time prior to decision for the consultations required by section 102 (2)(C) and the agency review process for which environmental statements are to be available, (2) obtaining information required in their preparation, (3) designating the officials who are to be responsible for the statements, (4) consulting with and taking account of the comments of appropriate Federal, State and local agencies and the public, including obtaining the comment of the Administrator of the Environmental Protection Agency when required under section 309 of the Clean Air Act, as amended, and (5) meeting the requirements of section 2(b) of Executive Order 11514 for providing timely public information on Federal plans and programs with environmental impact. Each agency, including both departmental and subdepartmental components having such procedures, shall review its procedures and shall revise them, in consultation with the Council, as may be necessary in order to respond to requirements imposed by these revised guidelines as well as by such previous directives. After such consultation, proposed revisions of such agency procedures shall be published in the FEDERAL REGISTER no later than October 30, 1973. A minimum 45-day period for public comment shall be provided, followed by publication of final procedures no later than forty-five (45) days after the conclusion of the comment period. Each agency shall submit seven (7) copies of all such procedures to the Council. Any future revision of such agency procedures shall similarly be proposed and adopted only after prior consultation with the Council and, in the case of substantial revision, opportunity for public comment. All revisions shall be published in the FEDERAL REGISTER.

(b) Each Federal agency should consult, with the assistance of the Council and the Office of Management and Budget if desired, with other appropriate Federal agencies in the development and revision of the above procedures so as to achieve consistency in dealing with similar activities and to assure effective coordination among agencies in their review of proposed activities. Where applicable, State and local review of such agency procedures should be conducted pursuant to procedures established by Office of Management and Budget Circular No. A-85.

(c) Existing mechanisms for obtaining the views of Federal, State, and local agencies on proposed Federal actions should be utilized to the maximum extent practicable in dealing with environmental matters. The Office of Management and Budget will issue instructions, as necessary, to take full advantage of such existing mechanisms.

§ 1500.4 Federal agencies included; effect of the Act on existing agency mandates.

(a) Section 102(2)(C) of the Act applies to all agencies of the Federal Government. Section 102 of the Act provides that "to the fullest extent possible: (1) The policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act," and section 105 of the Act provides that "the policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies." This means that each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. In accordance with this purpose, agencies should continue to review their policies, procedures, and regulations and to revise them as necessary to ensure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 is meant to make clear that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

§ 1500.5 Types of actions covered by the Act.

(a) "Actions" include but are not limited to:

(1) Recommendations or favorable reports relating to legislation including requests for appropriations. The requirement for following the section 102 (2)(C) procedure as elaborated in these guidelines applies to both (i) agency recommendations on their own proposals for legislation (see § 1500.12); and (ii) agency reports on legislation initiated elsewhere. In the latter case only the agency which has primary responsibility for the subject matter involved will prepare an environmental statement.

(2) New and continuing projects and program activities: directly undertaken by Federal agencies; or supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance (except where such assistance is solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et. seq. with no Federal agency control over the subsequent use of such funds); or involving a Federal lease, permit, license certificate or other entitlement for use.

(3) The making, modification, or establishment of regulations, rules, procedures, and policy.

§ 1500.6 Identifying major actions significantly affecting the environment.

(a) The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated. Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed major actions, the enviornmental impact of which is likely to be highly controversial, should be covered in all cases. In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several Government agencies individually make decisions about partial aspects of a major action. In all such cases, an environmental statement should be prepared if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action. The Council, on the basis of a written assessment of the impacts involved, is available to assist agencies in determining whether specific actions require impact statements.

(b) Section 101(b) of the Act indicates the broad range of aspects of the environment to be surveyed in any assessment of significant effect. The Act also indicates that adverse significant effects include those that degrade the quality of the environment, curtail the range of beneficial uses of the environment, and serve short-term, to the disadvantage of long-term, environmental goals. Significant effects can also include actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial. Significant effects also include secondary effects, as described more fully, for example, in § 1500.8(a)(iii)(B). The significance of a proposed action may also vary with the setting, with the result that an action that would have little impact in an urban area may be significant in a rural setting or vice versa. While a precise definition of environmental "significance," valid in all contexts, is not possible, effects to be considered in assessing significance include, but are not limited to, those outlined in Appendix II of these guidelines.

(c) Each of the provisions of the Act, except section 102(2)(C), applies to all Federal agency actions. Section 102(2)(C) requires the preparation of a detailed environmental impact statement in the case of "major Federal actions significantly affecting the quality of the human environment." The identification of major actions significantly affecting the environment is the responsibility of each Federal agency, to be carried out against the background of its own particular operations. The action must be a (1)

"major" action, (2) which is a "Federal action," (3) which has a "significant" effect, and (4) which involves the "quality of the human environment." The words "major" and "significantly" are intended to imply thresholds of importance and impact that must be met before a statement is required. The action causing the impact must also be one where there is sufficient Federal control and responsibility to constitute "Federal action" in contrast to cases where such Federal control and responsibility are not present as, for example, when Federal funds are distributed in the form of general revenue sharing to be used by State and local governments (see § 1500.5(ii)). Finally, the action must be one that significantly affects the quality of the human environment either by directly affecting human beings or by indirectly affecting human beings through adverse effects on the environment. Each agency should review the typical classes of actions that it undertakes and, in consultation with the Council, should develop specific criteria and methods for identifying those actions likely to require environmental statements and those actions likely not to require environmental statements. Normally this will involve:

(i) Making an initial assessment of the environmental impacts typically associated with principal types of agency action.

(ii) Identifying on the basis of this assessment, types of actions which normally do, and types of actions which normally do not, require statements.

(iii) With respect to remaining actions that may require statements depending on the circumstances, and those actions determined under the preceding paragraph (C)(4)(ii) of this section as likely to require statements, identifying: (a) what basic information needs to be gathered; (b) how and when such information is to be assembled and analyzed; and (c) on what bases environmental assessments and decisions to prepare impact statements will be made. Agencies may either include this substantive guidance in the procedures issued pursuant to § 1500.3(a) of these guidelines, or issue such guidance as supplemental instructions to aid relevant agency personnel in implementing the impact statement process. Pursuant to § 1500.14 of these guidelines, agencies shall report to the Council by June 30, 1974, on the progress made in developing such substantive guidance.

(d) (1) Agencies should give careful attention to identifying and defining the purpose and scope of the action which would most appropriately serve as the subject of the statement. In many cases, broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area (e.g., coal leases), or environmental impacts that are generic or common to a series of agency actions (e.g., maintenance or waste handling practices), or the overall impact of a large-scale program or chain of contemplated projects (e.g., major lengths of highway as opposed to small segments). Subsequent statements on major individual actions will be necessary where such actions have significant environmental impacts not adequately evaluated in the program statement.

(2) Agencies engaging in major technology research and development programs should develop procedures for periodic evaluation to determine when a program statement is required for such programs. Factors to be considered in making this determination include the magnitude of Federal investment in the program, the likelihood of widespread application of the technology, the degree of environmental impact which would occur if the technology were widely applied, and the extent to which continued investment in the new technology is likely to restrict future alternatives. Statements must be written late enough in the development process to contain meaningful information, but early enough so that this information can practically serve as an input in the decision-making process. Where it is anticipated that a statement may ultimately be required but that its preparation is still premature, the agency should prepare an evaluation briefly setting forth the reasons for its determination that a statement is not yet necessary. This evaluation should be periodically updated, particularly when significant new information becomes available concerning the potential environmental impact of the program. In any case, a statement must be prepared before research activities have reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives. Statements on technology research and development programs should include an analysis not only of alternative forms of the same technology that might reduce any adverse environmental impacts but also of alternative technologies that would serve the same function as the technology under consideration. Efforts should be made to involve other Federal agencies and interested groups with relevant expertise in the preparation of such statements because the impacts and alternatives to be considered are likely to be less well defined than in other types of statements.

(e) In accordance with the policy of the Act and Executive Order 11514 agencies have a responsibility to develop procedures to insure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties. In furtherance of this policy, agency procedures should include an appropriate early notice system for informing the public of the decision to prepare a draft environmental statement on proposed administrative actions (and for soliciting comments that may be helpful in preparing the statement) as soon as is practicable after the decision to prepare the statement is made. In this connection, agencies should: (1) maintain a list of administrative actions for which environmental statements are being prepared; (2) revise the list at regular intervals specified in the agency's procedures developed pursuant to § 1500.3(a) of these guidelines (but not less than quarterly) and transmit each such revision to the Council; and (3) make the list available for public inspection on request. The Council will periodically publish such lists in the FEDERAL REGISTER. If an agency decides that an environmental statement is not necessary for a proposed action (i) which the agency has identified pursuant to § 1500.6(c)(4)(ii) as normally requiring preparation of a statement, (ii) which is similar to actions for which the agency has prepared a significant number of statements, (iii) which the agency has previously announced would be the subject of a statement, or (iv) for which the agency has made a negative determination in response to a request from the Council pursuant to § 1500.11(f), the agency shall prepare a publicly available record briefly setting forth the agency's decision and the reasons for that determination. Lists of such negative determinations, and any evaluations made pursuant to § 1500.6 which conclude that preparation of a statement is not yet timely, shall be prepared and made available in the same manner as provided in this subsection for lists of statements under preparation.

§ 1500.7 Preparing draft environmental statements; public hearings.

(a) Each environmental impact statement shall be prepared and circulated in draft form for comment in accordance with the provisions of these guidelines. The draft statement must fulfill and satisfy to the fullest extent possible at the time the draft is prepared the requirements established for final statements by section 102(2)(C). (Where an agency has an established practice of declining to favor an alternative until public comments on a proposed action have been received, the draft environmental statement may indicate that two or more alternatives are under consideration.) Comments received shall be carefully evaluated and considered in the decision process. A final statement with substantive comments attached shall then be issued and circulated in accordance with applicable provisions of §§ 1500.10, 1500.11, or 1500.12. It is important that draft environmental statements be prepared and circulated for comment and furnished to the Council as early as possible in the agency review process in order to permit agency decisionmakers and outside reviewers to give meaningful consideration to the environmental issues involved. In particular, agencies should keep in mind that such statements are to serve as the means of assessing the environmental impact of proposed agency actions, rather than as a justification for decisions already made. This means that draft statements on administrative actions should be prepared and circulated for comment prior to the first significant point of decision in the agency review process. For major categories of agency action, this point should be identified in the procedures is-

sued pursuant to § 1500.3(a). For major categories of projects involving an applicant and identified pursuant to § 1500.6 (c)(c)(ii) as normally requiring the preparation of a statement, agencies should include in their procedures provisions limiting actions which an applicant is permitted to take prior to completion and review of the final statement with respect to his application.

(b) Where more than one agency (1) directly sponsors an action, or is directly involved in an action through funding, licenses, or permits, or (2) is involved in a group of actions directly related to each other because of their functional interdependence and geographical proximity, consideration should be given to preparing one statement for all the Federal actions involved (see § 1500.6(d)(1)). Agencies in such cases should consider the possibility of joint preparation of a statement by all agencies concerned, or designation of a single "lead agency" to assume supervisory responsibility for preparation of the statement. Where a lead agency prepares the statement, the other agencies involved should provide assistance with respect to their areas of jurisdiction and expertise. In either case, the statement should contain an environmental assessment of the full range of Federal actions involved, should reflect the views of all participating agencies, and should be prepared before major or irreversible actions have been taken by any of the participating agencies. Factors relevant in determining an appropriate lead agency include the time sequence in which the agencies become involved, the magnitude of their respective involvement, and their relative expertise with respect to the project's environmental effects. As necessary, the Council will assist in resolving questions of responsibility for statement preparation in the case of multi-agency actions. Federal Regional Councils, agencies and the public are encouraged to bring to the attention of the Council and other relevant agencies appropriate situations where a geographic or regionally focused statement would be desirable because of the cumulative environmental effects likely to result from multi-agency actions in the area.

(c) Where an agency relies on an applicant to submit initial environmental information, the agency should assist the applicant by outlining the types of information required. In all cases, the agency should make its own evaluation of the environmental issues and take responsibility for the scope and content of draft and final environmental statements.

(d) Agency procedures developed pursuant to § 1500.3(a) of these guidelines should indicate as explicitly as possible those types of agency decisions or actions which utilize hearings as part of the normal agency review process, either as a result of statutory requirement or agency practice. To the fullest extent possible, all such hearings shall include consideration of the environmental aspects of the proposed action. Agency procedures shall also specifically include provision for public hearings on major actions with environmental impact, whenever appropriate, and for providing the public with relevant information, including information on alternative courses of action. In deciding whether a public hearing is appropriate, an agency should consider: (1) The magnitude of the proposal in terms of economic costs, the geographic area involved, and the uniqueness or size of commitment of the resources involved; (2) the degree of interest in the proposal, as evidenced by requests from the public and from Federal, State and local authorities that a hearing be held; (3) the complexity of the issue and the likelihood that information will be presented at the hearing which will be of assistance to the agency in fulfilling its responsibilities under the Act; and (4) the extent to which public involvement already has been achieved through other means, such as earlier public hearings, meetings with citizen representatives, and/or written comments on the proposed action. Agencies should make any draft environmental statements to be issued available to the public at least fifteen (15) days prior to the time of such hearings.

§ 1500.8 Content of environmental statements.

(a) The following points are to be covered:

(1) A description of the proposed action, a statement of its purposes, and a description of the environment affected, including information, summary technical data, and maps and diagrams where relevant, adequate to permit an assessment of potential environmental impact by commenting agencies and the public. Highly technical and specialized analyses and data should be avoided in the body of the draft impact statement. Such materials should be attached as appendices or footnoted with adequate bibliographic references. The statement should also succinctly describe the environment of the area affected as it exists prior to a proposed action, including other Federal activities in the area affected by the proposed action which are related to the proposed action. The interrelationships and cumulative environmental impacts of the proposed action and other related Federal projects shall be presented in the statement. The amount of detail provided in such descriptions should be commensurate with the extent and expected impact of the action, and with the amount of information required at the particular level of decisionmaking (planning, feasibility, design, etc.). In order to ensure accurate descriptions and environmental assessments, site visits should be made where feasible. Agencies should also take care to identify, as appropriate, population and growth characteristics of the affected area and any population and growth assumptions used to justify the project or program or to determine secondary population and growth impacts resulting from the proposed action and its alternatives (see paragraph (a)(1)(3)(ii), of this section). In discussing these population aspects, agencies should give consideration to using the rates of growth in the region of the project contained in the projection compiled for the Water Resources Council by the Bureau of Economic Analysis of the Department of Commerce and the Economic Research Service of the Department of Agriculture (the "OBERS" projection). In any event it is essential that the sources of data used to identify, quantify or evaluate any and all environmental consequences be expressly noted.

(2) The relationship of the proposed action to land use plans, policies, and controls for the affected area. This requires a discussion of how the proposed action may conform or conflict with the objectives and specific terms of approved or proposed Federal, State, and local land use plans, policies, and controls, if any, for the area affected including those developed in response to the Clean Air Act or the Federal Water Pollution Control Act Amendments of 1972. Where a conflict or inconsistency exists, the statement should describe the extent to which the agency has reconciled its proposed action with the plan, policy or control, and the reasons why the agency has decided to proceed notwithstanding the absence of full reconciliation.

(3) The probable impact of the proposed action on the environment.

(i) This requires agencies to assess the positive and negative effects of the proposed action as it affects both the national and international environment. The attention given to different environmental factors will vary according to the nature, scale, and location of proposed actions. Among factors to consider should be the potential effect of the action on such aspects of the environment as those listed in Appendix II of these guidelines. Primary attention should be given in the statement to discussing those factors most evidently impacted by the proposed action.

(ii) Secondary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis. Many major Federal actions, in particular those that involve the construction or licensing of infrastructure investments (e.g., highways, airports, sewer systems, water resource projects, etc.), stimulate or induce secondary effects in the form of associated investments and changed patterns of social and economic activities. Such secondary effects, through their impacts on existing community facilities and activities, through inducing new facilities and activities, or through changes in natural conditions, may often be even more substantial than the primary effects of the original action itself. For example, the effects of the proposed action on population and growth may be among the more significant secondary effects. Such population and growth impacts should be estimated if expected to be significant (using data identified as indicated in § 1500.8(a)(1)) and an assessment made of the effect of any possible change in population patterns or growth upon the resource base, including land use, water, and public services, of the area in question.

(4) Alternatives to the proposed action, including, where relevant, those not within the existing authority of the responsible agency. (Section 102(2)(D) of the Act requires the responsible agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources"). A rigorous exploration and objective evaluation of the environmental impacts of all reasonable alternative actions, particularly those that might enhance environmental quality or avoid some or all of the adverse environmental effects, is essential. Sufficient analysis of such alternatives and their environmental benefits, costs and risks should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might enhance environmental quality or have less detrimental effects. Examples of such alternatives include: the alternative of taking no action or of postponing action pending further study; alternatives requiring actions of a significantly different nature which would provide similar benefits with different environmental impacts (e.g., nonstructural alternatives to flood control programs, or mass transit alternatives to highway construction); alternatives related to different designs or details of the proposed action which would present different environmental impacts (e.g., cooling ponds vs. cooling towers for a power plant or alternatives that will significantly conserve energy); alternative measures to provide for compensation of fish and wildlife losses, including the acquisition of land, waters, and interests therein. In each case, the analysis should be sufficiently detailed to reveal the agency's comparative evaluation of the environmental benefits, costs and risks of the proposed action and each reasonable alternative. Where an existing impact statement already contains such an analysis, its treatment of alternatives may be incorporated provided that such treatment is current and relevant to the precise purpose of the proposed action.

(5) Any probable adverse environmental effects which cannot be avoided (such as water or air pollution, undesirable land use patterns, damage to life systems, urban congestion, threats to health or other consequences adverse to the environmental goals set out in section 101 (b) of the Act). This should be a brief section summarizing in one place those effects discussed in paragraph (a)(3) of this section that are adverse and unavoidable under the proposed action. Included for purposes of contrast should be a clear statement of how other avoidable adverse effects discussed in paragraph (a)(2) of this section will be mitigated.

(6) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. This section should contain a brief discussion of the extent to which the proposed action involves tradeoffs between short-term environmental gains at the expense of long-term losses, or vice versa, and a discussion of the extent to which the proposed action forecloses future options. In this context short-term and long-term do not refer to any fixed time periods, but should be viewed in terms of the environmentally significant consequences of the proposed action.

(7) Any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. This requires the agency to identify from its survey of unavoidable impacts in paragraph (a)(5) of this section the extent to which the action irreversibly curtails the range of potential uses of the environment. Agencies should avoid construing the term "resources" to mean only the labor and materials devoted to an action. "Resources" also means the natural and cultural resources committed to loss or destruction by the action.

(8) An indication of what other interests and considerations of Federal policy are thought to offset the adverse environmental effects of the proposed action identified pursuant to paragraphs (a)(3) and (5) of this section. The statement should also indicate the extent to which these stated countervailing benefits could be realized by following reasonable alternatives to the proposed action (as identified in paragraph (a)(4) of this section) that would avoid some or all of the adverse environmental effects. In this connection, agencies that prepare cost-benefit analyses of proposed actions should attach such analyses, or summaries thereof, to the environmental impact statement, and should clearly indicate the extent to which environmental costs have not been reflected in such analyses.

(b) In developing the above points agencies should make every effort to convey the required information succinctly in a form easily understood, both by members of the public and by public decisionmakers, giving attention to the substance of the information conveyed rather than to the particular form, or length, or detail of the statement. Each of the above points, for example, need not always occupy a distinct section of the statement if it is otherwise adequately covered in discussing the impact of the proposed action and its alternatives—which items should normally be the focus of the statement. Draft statements should indicate at appropriate points in the text any underlying studies, reports, and other information obtained and considered by the agency in preparing the statement including any cost-benefit analyses prepared by the agency, and reports of consulting agencies under the Fish and Wildlife Coordination Act, 16 U.S.C. 661 et seq., and the National Historic Preservation Act of 1966, 16 U.S.C. 470 et seq., where such consultation has taken place. In the case of documents not likely to be easily accessible (such as internal studies or reports), the agency should indicate how such information may be obtained. If such information is attached to the statement, care should be taken to ensure that the statement remains an essentially self-contained instrument, capable of being understood by the reader without the need for undue cross reference.

(c) Each environmental statement should be prepared in accordance with the precept in section 102(2)(A) of the Act that all agencies of the Federal Government "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking which may have an impact on man's environment." Agencies should attempt to have relevant disciplines represented on their own staffs; where this is not feasible they should make appropriate use of relevant Federal, State, and local agencies or the professional services of universities and outside consultants. The interdisciplinary approach should not be limited to the preparation of the environmental impact statement, but should also be used in the early planning stages of the proposed action. Early application of such an approach should help assure a systematic evaluation of reasonable alternative courses of action and their potential social, economic, and environmental consequences.

(d) Appendix I prescribes the form of the summary sheet which should accompany each draft and final environmental statement.

§ 1500.9 Review of draft environmental statements by Federal, Federal-State, State, and local agencies and by the public.

(a) *Federal agency review.* (1) *In general.* A Federal agency considering an action requiring an environmental statement should consult with, and (on the basis of a draft environmental statement for which the agency takes responsibility) obtain the comment on the environmental impact of the action of Federal and Federal-State agencies with jurisdiction by law or special expertise with respect to any environmental impact involved. These Federal and Federal-State agencies and their relevant areas of expertise include those identified in Appendices II and III to these guidelines. It is recommended that the listed departments and agencies establish contact points, which may be regional offices, for providing comments on the environmental statements. The requirement in section 102(2)(C) to obtain comment from Federal agencies having jurisdiction or special expertise is in addition to any specific statutory obligation of any Federal agency to coordinate or consult with any other Federal or State agency. Agencies should, for example, be alert to consultation requirements of the Fish and Wildlife Coordination Act, 16 U.S.C. 661 et seq., and the National Historic Preservation Act of 1966, 16 U.S.C. 470 et seq. To the extent possible, statements or findings concerning environmental impact required by other statutes, such as section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 1653(f), or

section 106 of the National Historic Preservation Act of 1966, should be combined with compliance with the environmental impact statement requirements of section 102(2)(C) of the Act to yield a single document which meets all applicable requirements. The Advisory Council on Historic Preservation, the Department of Transportation, and the Department of the Interior, in consultation with the Council, will issue any necessary supplementing instructions for furnishing information or findings not forthcoming under the environmental impact statement process.

(b) *EPA review.* Section 309 of the Clean Air Act, as amended (42 U.S.C. § 1857h-7), provides that the Administrator of the Environmental Protection Agency shall comment in writing on the environmental impact of any matter relating to his duties and responsibilities, and shall refer to the Council any matter that the Administrator determines is unsatisfactory from the standpoint of public health or welfare or environmental quality. Accordingly, wherever an agency action related to air or water quality, noise abatement and control, pesticide regulation, solid waste disposal, generally applicable environmental radiation criteria and standards, or other provision of the authority of the Administrator is involved, Federal agencies are required to submit such proposed actions and their environmental impact statements, if such have been prepared, to the Administrator for review and comment in writing. In all cases where EPA determines that proposed agency action is environmentally unsatisfactory, or where EPA determines that an environmental statement is so inadequate that such a determination cannot be made, EPA shall publish its determination and notify the Council as soon as practicable. The Administrator's comments shall constitute his comments for the purposes of both section 309 of the Clean Air Act and section 102(2)(C) of the National Environmental Policy Act.

(c) State and local review. Office of Management and Budget Circular No. A-95 (Revised) through its system of State and areawide clearinghouses provides a means for securing the views of State and local environmental agencies, which can assist in the preparation and review of environmental impact statements. Current instructions for obtaining the views of such agencies are contained in the joint OMB-CEQ memorandum attached to these guidelines as Appendix IV. A current listing of clearinghouses is issued periodically by the Office of Management and Budget.

(d) *Public review.* The procedures established by these guidelines are designed to encourage public participation in the impact statement process at the earliest possible time. Agency procedures should make provision for facilitating the comment of public and private organizations and individuals by announcing the availability of draft environmental statements and by making copies available to organizations and individuals that request an opportunity to comment. Agencies should devise methods for publicizing the existence of draft statements, for example, by publication of notices in local newspapers or by maintaining a list of groups, including relevant conservation commissions, known to be interested in the agency's activities and directly notifying such groups of the existence of a draft statement, or sending them a copy, as soon as it has been prepared. A copy of the draft statement should in all cases be sent to any applicant whose project is the subject of the statement. Materials to be made available to the public shall be provided without charge to the extent practicable, or at a fee which is not more than the actual cost of reproducing copies required to be sent to other Federal agencies, including the Council.

(e) *Responsibilities of commenting entities.* (1) Agencies and members of the public submitting comments on proposed actions on the basis of draft environmental statements should endeavor to make their comments as specific, substantive, and factual as possible without undue attention to matters of form in the impact statement. Although the comments need not conform to any particular format, it would assist agencies reviewing comments if the comments were organized in a manner consistent with the structure of the draft statement. Emphasis should be placed on the assessment of the environmental impacts of the proposed action, and the acceptability of those impacts on the quality of the environment, particularly as contrasted with the impacts of reasonable alternatives to the action. Commenting entities may recommend modifications to the proposed action and/or new alternatives that will enhance environmental quality and avoid or minimize adverse environmental impacts.

(2) Commenting agencies should indicate whether any of their projects not identified in the draft statement are sufficiently advanced in planning and related environmentally to the proposed action so that a discussion of the environmental interrelationships should be included in the final statement (see § 1500.8(a)(1)). The Council is available to assist agencies in making such determinations.

(3) Agencies and members of the public should indicate in their comments the nature of any monitoring of the environmental effects of the proposed project that appears particularly appropriate. Such monitoring may be necessary during the construction, startup, or operation phases of the project. Agencies with special expertise with respect to the environmental impacts involved are encouraged to assist the sponsoring agency in the establishment and operation of appropriate environmental monitoring.

(f) Agencies seeking comment shall establish time limits of not less than forty-five (45) days for reply, after which it may be presumed, unless the agency or party consulted requests a specified extension of time, that the agency or party consulted has no comment to make. Agencies seeking comment should endeavor to comply with requests for extensions of time of up to fifteen (15) days. In determining an appropriate period for comment, agencies should consider the magnitude and complexity of the statement and the extent of citizen interest in the proposed action.

§ 1500.10 Preparation and circulation of final environmental statements.

(a) Agencies should make every effort to discover and discuss all major points of view on the environmental effects of the proposed action and its alternatives in the draft statement itself. However, where opposing professional views and responsible opinion have been overlooked in the draft statement and are brought to the agency's attention through the commenting process, the agency should review the environmental effects of the action in light of those views and should make a meaningful reference in the final statement to the existence of any responsible opposing view not adequately discussed in the draft statement, indicating the agency's response to the issues raised. All substantive comments received on the draft (or summaries thereof where response has been exceptionally voluminous) should be attached to the final statement, whether or not each such comment is thought to merit individual discussion by the agency in the text of the statement.

(b) Copies of final statements, with comments attached, shall be sent to all Federal, State, and local agencies and private organizations that made substantive comments on the draft statement and to individuals who requested a copy of the final statement, as well as any applicant whose project is the subject of the statement. Copies of final statements shall in all cases be sent to the Environmental Protection Agency to assist it in carrying out its responsibilities under section 309 of the Clean Air Act. Where the number of comments on a draft statement is such that distribution of the final statement to all commenting entities appears impracticable, the agency shall consult with the Council concerning alternative arrangements for distribution of the statement.

§ 1500.11 Transmittal of statements to the Council; minimum periods for review; requests by the Council.

(a) As soon as they have been prepared, ten (10) copies of draft environmental statements, five (5) copies of all comments made thereon (to be forwarded to the Council by the entity making comment at the time comment is forwarded to the responsible agency), and ten (10) copies of the final text of environmental statements (together with the substance of all comments received by the responsible agency from Federal, State, and local agencies and from private organizations and individuals) shall be supplied to the Council. This will serve to meet the statutory requirement to make environmental statements available to the President. At the same time that copies of draft and final statements are sent to the Council, copies should also be sent to relevant commenting en-

tities as set forth in §§ 1500.9 and 1500.10(b) of these guidelines.

(b) To the maximum extent practicable no administrative action subject to section 102(2)(C) is to be taken sooner than ninety (90) days after a draft environmental statement has been circulated for comment, furnished to the Council and, except where advance public disclosure will result in significantly increased costs of procurement to the Government, made available to the public pursuant to these guidelines; neither should such administrative action be taken sooner than thirty (30) days after the final text of an environmental statement (together with comments) has been made available to the Council, commenting agencies, and the public. In all cases, agencies should allot a sufficient review period for the final statement so as to comply with the statutory requirement that the "statement and the comments and views of appropriate Federal, State, and local agencies * * * accompany the proposal through the existing agency review processes." If the final text of an environmental statement is filed within ninety (90) days after a draft statement has been circulated for comment, furnished to the Council and made public pursuant to this section of these guidelines, the minimum thirty (30) day period and the ninety (90) day period may run concurrently to the extent that they overlap. An agency may at any time supplement or amend a draft or final environmental statement, particularly when substantial changes are made in the proposed action, or significant new information becomes available concerning its environmental aspects. In such cases the agency should consult with the Council with respect to the possible need for or desirability of recirculation of the statement for the appropriate period.

(c) The Council will publish weekly in the FEDERAL REGISTER lists of environmental statements received during the preceding week that are available for public comment. The date of publication of such lists shall be the date from which the minimum periods for review and advance availability of statements shall be calculated.

(d) The Council's publication of notice of the availability of statements is in addition to the agency's responsibility, as described in § 1500.9(d) of these guidelines, to insure the fullest practicable provision of timely public information concerning the existence and availability of environmental statements. The agency responsible for the environmental statement is also responsible for making the statement, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C., 552), without regard to the exclusion of intra- or interagency memoranda when such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action pursuant to § 1500.9 of these guidelines. Agency procedures prepared pursuant to § 1500.3(a) of these guidelines shall implement these public information requirements and shall include arrangements for availability of environmental statements and comments at the head and appropriate regional offices of the responsible agency and at appropriate State and areawide clearinghouses unless the Governor of the State involved designates to the Council some other point for receipt of this information. Notice of such designation of an alternate point for receipt of this information will be included in the Office of Management and Budget listing of clearinghouses referred to in § 1500.9(c).

(e) Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these guidelines concerning minimum periods for agency review and advance availability of environmental statements, the Federal agency proposing to take the action should consult with the Council about alternative arrangements. Similarly where there are overriding considerations of expense to the Government or impaired program effectiveness, the responsible agency should consult with the Council concerning appropriate modifications of the minimum periods.

(f) In order to assist the Council in fulfilling its responsibilities under the Act and under Executive Order 11514, all agencies shall (as required by section 102(2)(H) of the Act and section 3(i) of Executive Order 11514) be responsive to requests by the Council for reports and other information dealing with issues arising in connection with the implementation of the Act. In particular, agencies shall be responsive to a request by the Council for the preparation and circulation of an environmental statement, unless the agency determines that such a statement is not required, in which case the agency shall prepare an environmental assessment and a publicly available record briefly setting forth the reasons for its determination. In no case, however, shall the Council's silence or failure to comment or request preparation, modification, or recirculation of an environmental statement or to take other action with respect to an environmental statement be construed as bearing in any way on the question of the legal requirement for or the adequacy of such statement under the Act.

§ 1500.12 Legislative actions.

(a) The Council and the Office of Management and Budget will cooperate in giving guidance as needed to assist agencies in identifying legislative items believed to have environmental significance. Agencies should prepare impact statements prior to submission of their legislative proposals to the Office of Management and Budget. In this regard, agencies should identify types of repetitive legislation requiring environmental impact statements (such as certain types of bills affecting transportation policy or annual construction authorizations).

(b) With respect to recommendations or reports on proposals for legislation to which section 102(2)(C) applies, the final text of the environmental statement and comments thereon should be available to the Congress and to the public for consideration in connection with the proposed legislation or report. In cases where the scheduling of congressional hearings on recommendations or reports on proposals for legislation which the Federal agency has forwarded to the Congress does not allow adequate time for the completion of a final text of an environmental statement (together with comments), a draft environmental statement may be furnished to the Congress and made available to the public pending transmittal of the comments as received and the final text.

§ 1500.13 Application of section 102(2)(C) procedure to existing projects and programs.

Agencies have an obligation to reassess ongoing projects and programs in order to avoid or minimize adverse environmental effects. The section 102(2)(C) procedure shall be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970. While the status of the work and degree of completion may be considered in determining whether to proceed with the project, it is essential that the environmental impacts of proceeding are reassessed pursuant to the Act's policies and procedures and, if the project or program is continued, that further incremental major actions be shaped so as to enhance and restore environmental quality as well as to avoid or minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.

§ 1500.14 Supplementary guidelines; evaluation of procedures.

(a) The Council after examining environmental statements and agency procedures with respect to such statements will issue such supplements to these guidelines as are necessary.

(b) Agencies will continue to assess their experience in the implementation of the section 102(2)(C) provisions of the Act and in conforming with these guidelines and report thereon to the Council by June 30, 1974. Such reports should include an identification of the problem areas and suggestions for revision or clarification of these guidelines to achieve effective coordination of views on environmental aspects (and alternatives, where appropriate) of proposed actions without imposing unproductive administrative procedures. Such reports shall also indicate what progress the agency has made in developing substantive criteria and guidance for making environmental assessments as required by § 1500.6(e) of this directive and by section 102(2)(B) of the Act.

Effective date. The revisions of these guidelines shall apply to all draft and final impact statements filed with the Council after January 28, 1973.

THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
DEPARTMENTAL POLICIES
RESPONSIBILITIES AND PROCEDURES FOR PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

Department of Housing and Urban Development

[1385.1]

DEPARTMENTAL POLICIES, RESPONSIBILITIES AND PROCEDURES FOR PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

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1. *Purpose and authority.* The National Environmental Policy Act of 1969 (Public Law 91-190) establishes new national policy, goals, and procedures for protecting and enhancing the environment. This Act governs Federal departments and agencies, and requires systematic attention to the environmental consequences of all Federal activities. The purposes of this circular are to set forth departmental policy and to provide procedural guidance to all headquarters and field offices under this Act. This circular applies to HUD legislative proposals, all HUD central office guidance documents (including guides, regulations, handbooks, circulars, technical standards, etc.), and individual project approval actions on insurance, loans, and grants, subsidies and demonstration projects.

This circular is based on authority provided in:

a. The Department of Housing and Urban Development Act of 1965 (Public Law 89-174) which provides that the Secretary may make rules and regulations as may be necessary to carry out his functions, powers, and duties, and sets forth, as a matter of national purpose, the sound development of the Nation's communities and metropolitan areas;

b. The National Environmental Policy Act of 1969 (Public Law 91-190) which establishes a comprehensive policy for protection and enhancement of environmental quality by the Federal Government, creates the Council on Environmental Quality (CEQ) in the Executive Office of the President and directs Federal agencies to carry out the purposes of this Act;

c. Presidential Executive Order 11514, dated March 5, 1970, which directs heads of agencies to monitor, evaluate, and control their agencies' activities so as to protect and enhance the quality of the environment;

d. The guidelines of the Council on Environmental Quality, dated April 23, 1971, which call for heads of agencies to establish agency procedures for implementing section 102(2)C of Public Law 91-190;

e. Office of Management and Budget (OMB) Bulletin 71-3, August 31, 1970, which requires environmental statements to accompany legislative proposals and provides for materials in support of the appropriations process;

f. OMB Circular A-95 dated February 9, 1971, which provides for inputs to section 102(2)C environmental statements by State and local governmental agencies with environmental quality responsibilities;

g. Presidential Executive Order 11593, dated May 13, 1971, which requires heads of agencies to administer their programs so as to preserve the Nation's cultural environment, particularly sites on the National Register of Historic Places;

h. Section 4(f) of the Department of Transportation Act of 1966 (Public Law 89-670) as amended by Public Law 90-945 which together call for HUD comments on the impact of highways on natural environments, particularly parks and recreation areas;

i. The Housing Act of 1937 (Public Law 75-412) which authorized Federal assistance to low rent public housing and conveys standard setting authority; and

j. The National Housing Act (Public Law 73-479) which created the Federal Housing Administration and encourages improvement in housing standards and conditions.

2. *Definitions.* Appendix A contains decision points by which stage environment clearances must be completed, thresholds which require special clearances, and definitions of key terms used in this circular, including "Environment," "Normal" and "Special" environmental clearances, "Environmental Clearance worksheet," "Negative Statement," "Major HUD actions significantly Affecting the Quality of the Human Environment," "Environmental Statement" (draft and final), "Comment," and others. Clear understanding of these terms is basic to interpretation of policies set forth below.

3. *Policy.* The national goal of "a decent home in a suitable living environment for every American family"—established by the Housing Act of 1949 and subsequently reaffirmed—is central to the mission of the Department of Housing and Urban Development (HUD). Pursuant to Public Law 91-190, HUD must continue to review, update, or establish policies, standards, and procedures for administering HUD programs to promote environmental quality.

a. *Policy on actions initiated by HUD.* Public Law 91-190 and CEQ guidelines require that prior to "major Federal actions significantly affecting the quality of the human environment" an assessment of environmental consequences shall be made in the form of a (draft) environmental statement, which shall be circulated for comment by Federal, State, and local agencies as provided in CEQ guidelines and then revised as needed. A final environmental statement shall accompany the proposed action through HUD's review and decision processes. The following sections establish policy for such major HUD actions and for lesser actions relating to environment.

(1) *Legislation.* HUD legislative proposals may be "major actions." The General Counsel, in consultation with the Deputy Under Secretary, and based on the significance of the expected environmental impact, shall determine which HUD legislative proposals shall be accompanied by an environmental statement.

(2) *New central office guidance documents, including regulations, policy circulars, program handbooks and guides, standards documents, etc.* Promulgation of these guidance documents may be "major actions," and in each case a determination shall be made in consultation with the Deputy Under Secretary as to whether or not there is a significant impact on the human environment. In all cases where there is a significant environmental impact, environmental statement shall be prepared prior to promulgation and cleared concurrently with A-95 review of the basic document whenever possible. Except as noted herein, the promulgation of guidance documents shall be the principal means for administering environmental quality standards within the department.

(3) *Updating existing guidance documents.* In order to assure adequacy of environmental requirements, each Assistant Secretary and the Administrator of the Federal Insurance Administration, prior to June 30, 1972, shall either (a) issue an office-wide circular with environmental policies, environmental standards, and environmental clearance procedures which will govern all programs and activities administered by his office, or (b) identify those existing guidance documents which have a significant bearing on the environment, including site characteristics, and update these guidance documents as appropriate. Both options shall incorporate "normal environmental clearance" and "special environmental clearance" procedures into routines for processing applications (see definitions).

(4) *HUD project level actions, including insurance, grants, and loans, debt guarantees, subsidiaries, planning activities, demonstration activities, etc.* HUD processes between 15,000 and 20,000 applications per year at the project level, not including insurance actions on individual houses. Except as provided herein, approvals of these applications are not construed as "major Federal actions."

(a) *"Normal environmental clearance" for projects and for proposed changes or amendatories.* Normal environmental clearances (see definitions) shall be established to assure a consideration of alternatives and suitable environmental conditions for all project approvals, including major changes or amendatories to an approved project, but excluding insurance on individual houses. These clearances shall assure compliance with central office policies and standards, and shall be completed before the HUD decision points summarized in Appendix A.

(b) *"Special environmental clearances" for selected projects and amendatories.* Special clearances (see definitions) shall be undertaken for those projects whose acceptability cannot be determined in normal clearance and for projects of larger size or special environmental significance above the thresholds in Appendix A. For projects requiring special environmental clearance, a negative statement or a final 102(2)C environmental statement shall be placed in the application file to accompany the application through the HUD review process. The HUD Environmental Clearance Worksheet (see Appendix B) [1] is suggested for carrying out special clearances.

(c) *Detailed environmental statements on unusually large or complex projects and major amendatories.* Final section 102(2)C environmental statements shall be completed for a limited number of projects or amendatories whose environmental issues cannot be satisfactorily resolved in special clearance and for all applications and major amendatories under the following:

(i) New communities activities under Title VII, including debt guarantee, interest loan, grant for waiver of tax exemption, and certification of eligibility, and

(ii) Title X (large scale subdivisions).

(d) *Exceptions.* All disaster aid and emergency activities of the department shall be excepted from the 102(2)C requirement.

(5) *Timing of 102(2)C environmental statements and HUD approval actions.*

(a) Pursuant to section 10(b) of the Guidelines of the Council on Environmental Quality, published April 23, 1971, HUD's 102(2)C environmental statements for "major HUD actions significantly affecting the quality of the human environment" must be filed with the CEQ and made available to appropriate agencies and to the public.

(i) In draft form at least 90 days before HUD approval of, or commitment to, the proposed action, and

(ii) In final form at least 30 days before HUD approval of, or commitment to, the proposed action.

(b) Exceptions in the form of reduced time periods are permitted under sections 10 (b) and (d) of the CEQ guidelines, but are discouraged. They must be approved by the Deputy Under Secretary in consultation with the CEQ on a case by case basis; realistic time periods for comment shall be maintained.

(6) *Public disclosure.* Draft and final section 102(2)C environmental statements and negative statements shall be made available to the public in accordance with the instructions of Executive Order 11514 and the CEQ guidelines "to insure the fullest practical provision of timely public information and understanding of Federal plans and programs."

(a) After environmental statements and proposed distributions are approved by the

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[1] Appendixes B-H, and I and II, filed as part of the original document.

Deputy Under Secretary, the initiating HUD office shall provide copies to appropriate Federal, State, and local officials and key private groups having an interest in the Federal action in point, and to appropriate HUD information centers for reading by the public.

(b) Based on distribution by the CEQ, retention copies of environmental statements may be purchased for $3.00 by interested members of the public from the National Technical Information Service, Department of Commerce, Springfield, Va. 22151.

(c) Negative statements and supporting evidence shall be available to the public through the cognizant HUD information offices.

b. *Policy for HUD comments on 102(2)C environmental statement initiated by other Federal agencies.*

(1) All 102(2)C environmental statements on project level actions initiated outside HUD shall be referred to the HUD Regional Administrator in whose jurisdiction the project falls, or to his designee, for "comment" (see definitions).

(a) HUD comment on project actions shall be related to areas of HUD jurisdiction by law or special expertise as defined by Appendix II [1] of the CEQ guidelines of April 23 1971.

(b) The Regional Administrator (or his designated Environmental Clearance Officer) normally shall speak for HUD in these matters, and develop appropriate comments within 30 days. HUD comments recommending delay or rejection of a major undertaking by another agency, comments may be referred to the Deputy Under Secretary for mailout, including copies to the CEQ. Precedent-making comments of national significance also warrant referral to the Deputy Under Secretary.

(2) All 102(2)C statements from other Federal agencies on legislation and on guidance documents shall be sent to the General Counsel and Deputy Under Secretary, respectively, for comment.

(3) Pursuant to CEQ guidelines, ten (10) HUD copies of HUD comments normally shall be sent by the commenting HUD office directly to the General Counsel, Council on Environmental Quality, 722 Jackson Place NW., Washington, DC 20006.

4. *Office responsibilities for protection and enhancement of environmental quality.*

a. *Deputy Under Secretary.* The Deputy Under Secretary is assigned the overall departmental responsibility for administering and coordinating policies and procedures set forth in this circular. He shall be assisted as appropriate by all Assistant Secretaries, the General Counsel, the Federal Insurance Administrator, and the HUD Regional Administrators, and he shall have authority to delegate portions of the total responsibility as appropriate. The Deputy Under Secretary shall provide leadership in moving toward a unified departmental set of policies and standards to be applied to all HUD actions. He shall also be HUD's principal point of contact with the Council on Environmental Quality, the Environmental Protection Agency, other Federal agencies and State and local groups.

b. *General Counsel.* Effective immediately, the General Counsel shall:

(1) Designate an "Environmental Clearance Officer" as his principal adviser on environmental matters and establish environmental clearance procedures for his office;

(2) Prepare, in cooperation with program and policy offices, "environmental statements" on all new HUD legislative proposals significantly affecting the environment, and forward same to the Deputy Under Secretary; and

(3) Support the Deputy Under Secretary on matters relating to litigation, interpretation of statutory requirements, and other areas as appropriate.

c. *Assistant Secretaries and Federal Insurance Administrator.* Effective immediately, each Assistant Secretary and the Federal Insurance Administrator shall:

(1) Designate an "Environmental Clearance Officer" (a senior official or staff director) who shall act as "principal advisor" on environmental matters, maintain an "environmental clearance officer's notebook" of Federal guidance documents, oversee the development of environmental policies, standards, and procedures and maintain liaison with the Deputy Under Secretary.

(2) Before June 30, 1972, establish, update, collate, and simplify, in cooperation with the Deputy Under Secretary, the environmental quality policies and standards for programs and activities under his jurisdiction, including the development of procedures and simplified application forms with environmental components, and the identification of decision points and thresholds;

(3) Establish and maintain, in cooperation with the Deputy Under Secretary, orderly procedures for environmental clearances for all activities under his jurisdiction in HUD headquarters and forward copies of these procedures to the Deputy Under Secretary (these shall provide for an environmental statement or negative statement on all proposed regulations and guidance documents: Environmental statements shall be cleared with normal A-85 clearance of the guidance document whenever possible);

(4) Assign adequate personnel to environmental protection and enhancement, provide a formal evaluation of progress each year in cooperation with the Deputy Under Secretary;

(5) The Assistant Secretary for Administration or his designee shall further support the Deputy Under Secretary in budgetary process requirements set forth in OMB Bulletin No. 71-3.

d. *Regional Administrators.* Effective immediately, the Regional Administrators, assisted by Area Office and Insuring Office Directors, shall:

(1) Designate a Regional Environmental Clearance Officer (a senior official or staff director reporting directly to the Regional Administrator or his Deputy) who shall act as principal Adviser to the region on environmental affairs, maintain the official file of Federal regulations and policies on environment, and establish and maintain a system for environmental clearances throughout the region (a copy to Deputy Under Secretary);

(2) Enforce departmental environmental clearance policies and standards, including normal and special environmental clearances, the preparation and forwarding of draft and final environmental statements and proposed distribution lists to the Deputy Under Secretary for approval, appropriate distribution of environmental statements, and guiding the preparation of HUD "comment" on major Federal actions proposed by other agencies; and

(3) Assign adequate personnel for carrying out environmental clearances described herein, provide for formal periodic evaluation of the progress in implementing Public Law 91-190, and bring to the attention of the Deputy Under Secretary significant policy issues regarding which the existing departmental posture appears inadequate.

e. *Area Office and Insuring Office Directors.* Under supervision of the Regional Administrator, the Area and Insuring Office Directors, effectively immediately, shall:

(1) Designate an Environmental Clearance Officer (a senior official or staff director reporting directly to him or his Deputy) who shall act as principal adviser to the Director on environmental affairs, maintain the official file of Federal regulations, policies, and standards on environment, and oversee environmental clearances described in this circular;

(2) Establish, with approval of region, orderly procedures for environmental clearances set forth in this circular for all programs, and enforce departmental environ grams, and enforce departmental environmental policies and standards with respect to all applications processed by the office except insurance on individual houses; and

(3) Assign adequate personnel to environmental clearance functions, provide for periodic evaluation of environmental impact, and bring unresolved policy issues to the attention of the Regional Administrator and the Deputy Under Secretary.

APPENDIX A

PART I: DEFINITIONS

This appendix defines important terms used in the body of this circular and sets forth in Part II on a program-by-program basis the decision points at which stage environmental clearances must be completed for their respective HUD programs. Part II also lists program thresholds above for which a special environmental clearance is required.

1. *Environment.* Environment is not defined in the basic legislation or in the CEQ Guidelines. However, it is clear from section 102 in the Act and elsewhere that it is broadly defined to include physical, social, and aesthetic dimensions, and that interdisciplinary analyses are required well beyond the normal technical and economic considerations. Examples of environmental considerations are: Air and water pollution, erosion control, natural hazards, land use planning, site selection and design, subdivision development, conservation of flora and fauna, urban congestion, overcrowding, displacement and relocation resulting from public or private action or natural disaster, noise pollution, urban blight, code violations and building abandonment, prevention of suburban sprawl, etc.

2. *"Normal Environmental Clearance" for projects and major changes or amendatories.* That HUD assessment of site characteristics, environmental consequences, and alternatives with superior environmental consequences that shall be applied to every application for insurance or assistance (except individual housing insurance actions). This clearance takes place primarily at the area and insuring office level. In addition to such special requirements as Assistant Secretaries and Regional Administrators establish in their respective jurisdictions, the "normal environmental clearance" shall consist of:

a. Consistency check of proposal with HUD central office environmental policies and standards;

b. Opportunity for comments from A-95 agencies for all HUD programs and projects covered by revised OMB Circular A-95, dated February 9, 1971;

c. (Optional) comments as may be appropriate from other State and local officials or field offices of Federal agencies with responsibility for environmental standards in areas of special concern on a case by case basis;

d. Checkoff to assure consistency with the policy regarding the National Register of Historic Places and other aspects of Executive Order 11593;

e. Evidence of local approval, e.g., building permit in the case of new housing—this approval affords State and local government opportunity to incorporate requirements for public water supply, sewerage treatment, etc., into the process;

f. Site visits and prudent judgment by HUD field office personnel to assure that there are no significant adverse environmental consequences; and

g. Consultation with the Office of the Deputy Under Secretary for precedent-making or otherwise unusual cases.

3. *"Special Environmental Clearance" for*

[1] Appendixes B-H, and I and II, filed as part of the original document.

projects and major changes. That additional review of environmental consequences which shall be applied to larger size projects or projects with greater environmental significance (including all projects above thresholds in Appendix A) and to projects which are controversial with regard to whether or not HUD and other appropriate environmental policies and standards are being met, or precedentmaking in the sense that important environmental circumstances are not treated in HUD's central office guidance documents. For this purpose, the HUD Environmental Clearance Worksheet (see Appendix B)[1] is suggested. All special environmental clearances shall result in either (a) a negative statement signed by the head of the HUD field office (or his designated Environmental Clearance Officer), indicating that approval of the application is consistent with established HUD policy and standards and would have no significant adverse effect on the environment, or (b) if there are still unresolved environmental issues and concerns, the drafting and circulating of a 102(2)C environmental statement. A negative statement or a 102(2)C environmental statement shall become part of the application file and shall accompany the application through the HUD review and decision process.

4. *Threshold*. A threshold is a criterion of size or of environmental impact which requires a special environmental clearance and or a 102(2)C environmental statement. Thresholds are set forth in Appendix A on a program-by-program basis. The Deputy Under Secretary's office invites field comment on suitability and on additional needs.

5. *HUD environmental clearance worksheet*. A HUD standard form (see Appendix B)[1] for identifying key environmental impacts and for assessing alternatives as required in Public Law 91-190 and CEQ guidelines. Assistant Secretaries are authorized to structure individual components of the form (particularly the impact section) to facilitate checkoff for their program needs. A draft worksheet (Appendix B-1)[1] may be used as part of the program application. A final worksheet (Appendix B-2)[1] is the sole responsibility of the HUD reviewing officials.

6. *Negative statement*. A statement by a HUD official that no environmental statement is required for the proposed HUD action under consideration. In the event that no environmental statement is planned, "negative statements" shall be filed with the Deputy Under Secretary early in the development of new or revised central office guidance documents, and in review of project actions administered by the central office. HUD Regional Administrators shall require either a negative statement signed by the Area or Insuring Office Director (or another designated Environmental Clearance Officer) or an environmental statement for project actions not eliminated by established thresholds for HUD programs. The negative statement shall not be issued for projects which are in violation of central office environmental policies and standards and it shall not be used without a sufficient factual basis as will stand up under careful judicial scrutiny in the event of litigation. A format for a negative statement is set forth in Appendix E.[1]

7. *Major HUD actions significantly affecting the quality of the human environment*. The HUD portion of major Federal actions in the comparable phrase appearing in section 102(2)C of the statute and defined in the CEQ Guidelines, especially paragraph 5 therein. All such actions require the completion of a 102(2)C environmental statement 30 days prior to HUD decision. The definition includes two parts on identifi-

[1] Appendixes B–H, and I and II, filed as part of the original document.

Decision points for completing environmental clearances on applications	*Thresholds*
New communities activities (note A-95 requirement)	
1. Debt guarantee or certification of eligibility—offer of commitment or major change to approved plan. (Activities are preconditions for public service grants and supplemental grants.)	All projects for actions 1, 2, and 3 require 102(2)C statements.
2. Interest loan—same decision point as No. 1.	
3. Grant for waiver of tax exemption—same decision point as No. 1.	
4. Special planning loan or grant (see threshold).	Planning grants under action 4 will have an environmental assessment in a 102(2)C format as a final product. *
Open space (note A-95 requirement)	
Approval of application for funds or major amendatory.	1. All sanitary landfill projects, or 2. Projects upon which two or more surface acres of water will be impounded, or 3. Projects in excess of 300 acres.
Water and sewer (note A-95 requirement)	
Approval of application to fund a facility (note: The Environmental Protection Agency funds interceptor sewers and waste treatment plants).	1. Projects requiring new water treatment plants, or 2. Projects resulting in impoundment of water of more than five acres.
Urban renewal (note A-95 requirement)	
(Conventional) approval of plan or fund reservation for Part I (or combined Parts I and II), i.e., approval of either the urban renewal plan or fund reservation to carry the real estate acquisition, public improvements, rehabilitation, clearance or resale aspects of plan to completion.	1. Plans that change concentration in the renewal area approaching or in excess of 50 percent increase in density, or in vehicular traffic, or in demand for energy, or in demand for other public services, or
(Neighborhood development program—a special mechanism for funding annual increments of renewal) approval of fund reservation, i.e., approval of locality's plan and budget for 12 months of activities to implement the plan (see conventional).	2. Conversions of use expected to produce noise, waste products or waste energy which exceed capacity of existing facilities and airsheds to absorb them in manner that meets applicable standards.
Approval of major amendatories that trigger thresholds.	3. Projects involving structures on National Register of Historic Places. 4. Plans involving an increase of 100 or more feet in the height of any structure over any previosuly existing structure.
Public facilities loans (note A-95 requirement)	
Approval of application or major amendatory.	Same as water and sewer and open space.
Model cities (note A-95 requirement)	
Approval of application or major amendatory.	Use urban renewal, open space, and water and sewer thresholds.
Housing assistance or insurance (*see also HPMC–FHA 1500.1re: A-95*)	
Approval of feasibility letter, or major proposed change in the letter or project, for Subdivisions. Title X (large scale subdivisions). Multifamily mortgage insurance. Mobile home courts. Nursing homes.	1. 50 lot subdivision, or 2. 100 unit multifamily structures or 3. 200 unit college housing structures, or 4. 100 unit mobile home courts (some regional administrators have suggested 50; discretion is granted to use this figure), or 5. 100 bed nursing homes, or 6. Any proposal involving sites for which compliance with central office environmental policies and standards is in doubt or under challenge.
Letter of notification of site approval or disapproval for public housing projects.	
Approval of fund reservation for college housing or major change to a fund reservation.	
Stage of HUD commitment for other programs not listed.	
Demonstration projects	
Approval of application or major proposed amendatory or change in the project.	Projects totaling $500,000 or more (from all sources) in new construction.
Flood and disaster insurance (note A-95 requirement)	
Designation by HUD of area having special flood hazard.	After normal administrative review, use negative statement prior to designations, or prepare 102(2)C statement.

ion of actions and an assessment of vironmental consequences. The identified jor actions include legislative proposals, issuance of central office guidance docuents, and a limited number of HUD project ions determined by policy criteria and resholds set forth in Part II of Appendix Assessment of the environmental conseences to be "significant" is a matter of dgment and consensus; at the project level, is judgment shall be governed largely by ablished environmental policies and ndards.

Environmental statement. That specid one-page summary sheet and the deled, interdisciplinary analysis of environental consequences prescribed in section 2(2)C of Public Law 91-190 and in the EQ Guidelines; the HUD format is set th in Appendix C.[1] Although inputs can d should be requested from the applicant, e draft and final environmental statements the sole responsibility of reviewing JD officials. A "draft environmental statent" is the draft required by the CEQ idelines to be circulated by a responsible icial of the cognizant Federal agency to deral, State, and local agencies designated the CEQ and made available to the pub for comment. A "final environmental atement" is the mature revised draft reired by statute to incorporate external mment, to be filed with the CEQ, and acmpany the proposed action through the partment's review and decision processes. is the clear intent of the legislation that e final environmental statement be cometed and filed with the CEQ prior to even ntative HUD commitment or approval so at feedback from the environmental statent can improve the environmental conquences of the proposed action. CEQ idelines established a 30-day delay in pproval after the final statement is filed.

9. *Comments.* Formal reactions by one deral agency to the proposed action and e draft environmental statement of anher Federal agency; also formal reactions State and local agencies or of public or ivate groups to the proposed action. Each deral agency, including HUD, is obliged to ke these comments received on its draft vironmental statement into account in the al environmental statement and HUD's pproval or disapproval of the proposal. The JD format for comments is set forth in Apndix D.[1]

10. Areas of jurisdiction by law or spel expertise. The areas in which one agency required to comment on major actions by nother agency in accordance with Public w 91-190 and the CEQ Guidelines. Apndix II[1] to the CEQ Guidelines provides EQ views on these areas. HUD Regional dministrators are invited to work out more ecific definitions within their Regional ouncil of mechanism and in bilateral arngements with field offices of other Federal encies in accordance with special needs of eir regions and in the perspective of availle staffing

APPENDIX A

PART II—DECISION POINTS AND THRESHOLDS

The basic policy outlined in this circular to complete 102(2)C environmental statents prior to decisions on legislation, cenal office guidance documents and large or herwise exceptional projects significantly fecting the quality of the human environent. For the more routine projects, it is JD policy to rely primarily on "normal" or pecial" environmental clearances on apications or major amendatories and thus force central office policies and standards careful administrative review of applicaons.

The table below identifies in HUD's review ocesses the decision points by which all HUD environmental clearances must be completed. The table also sets forth thresholds above which "special clearance" is required. Special clearance must be followed by a negative statement or a 102(2)C environmental statement. In general, the 102(2)C statement shall be completed for projects which are controversial with regard to whether or not HUD and other environmental policies and standards are being met, or precedent making in the sense that important environmental circumstances relating to the proposal are not treated in central office guidance docum ts.

Both HUD's General Counsel and the Council on Environmental Quality have earlier opined that it is undesirable and inappropriate to approve projects subject to environmental clearance. It is departmental policy that environmental clearances shall be part of the generic review process and shall not be separated for later approval.

[1] Appendixes B-H, and I and II, filed as art of the original document.

THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT REGULATIONS ON URBAN GROWTH AND NEW COMMUNITY DEVELOPMENT ACT OF 1970

24 C.F.R. §32 (36 Fed. Reg. 14205-14 (July 31, 1971)

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Reprinted from Federal Register, 36 F.R. 14205-14
July 31, 1971

DRAFT REGULATIONS

Urban Growth and New Community Development Act of 1970

Enacted by
TITLE VII-HOUSING AND URBAN DEVELOPMENT ACT OF 1970
PUBLIC LAW 91-609

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

[24 CFR Part 32]

[Docket No. R-71-133]

ASSISTANCE FOR NEW COMMUNITIES

Notice of Proposed Rule Making

Notice is hereby given that the Community Development Corporation established within the Department of Housing and Urban Development proposes to issue the regulations set forth below as a new Part 32 of Title 24, pursuant to Part B of the Urban Growth and New Community Development Act of 1970 (title VII of the Housing and Urban Development Act of 1970, 42 U.S.C. 4511 et seq.).

Interested persons are invited to submit written comments or suggestions regarding the proposed regulations in triplicate to the Rules Docket Clerk, Office of the General Counsel, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410, on or before September 10, 1971. All communications timely received will be considered before taking action on the proposed regulations. The proposals contained in this notice may be changed in light of comments received. A copy of each submittal will be available for public inspection during business hours, both before and after the closing date set out above, in the HUD Information Center at the above address.

The proposed regulations cover certain new communities assistance provisions contained in the Urban Growth and New Community Development Act of 1970 which were not included in the President's Budget for 1972. Implementation of final regulations relating to such provisions is not contemplated prior to approval of a budget program transmitted pursuant to the Government Corporation Control Act.

This document is issued pursuant to section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535 (d)).

The proposed regulations are as follows:

PART 32—ASSISTANCE FOR NEW COMMUNITIES

Subpart A—General

Sec.
32.1 Statement of applicable law.
32.2 Definitions.
32.3 Information.

Subpart B—New Community Criteria and Standards

32.5 Applicability of this part.
32.6 General criteria for new communities.
32.7 Specific eligibility criteria.
32.8 Other requirements for new community development.

Subpart C—Financial and Economic Criteria and Standards

32.10 Applicability.
32.11 Economic feasibility.
32.12 General financial plan and program.
32.13 Maximum Federal guarantee.
32.14 Loans.
32.15 Real estate appraisals.
32.16 Costs of and revenues from land development.
32.17 Terms and conditions of borrowing guaranteed or for which interest is loaned.
32.18 Equity and working capital.
32.19 Security for the guarantee and interest loans.
32.20 Terms and conditions of payment under guarantees.
32.21 Use of proceeds of guaranteed obligations.

Subpart D—Procedures

32.22 Preapplication proposal.
32.23 Application.
32.24 Project agreement.
32.25 Issuance of guaranteed obligations.
32.26 Disbursement of loans.
32.27 Project execution and monitoring.
32.28 Supplementary grants.
32.30 Multiple forms of assistance.
32.31 Projects initiated under the New Communities Act of 1968.

Subpart E—Fee and Charge Schedule

32.33 Application charge.
32.34 Commitment charge.
32.35 Reopening charge.
32.36 Guarantee fee.
32.37 Annual fee for guarantees.
32.38 Transfer charge.

Ex HUD 307

Subpart A—General

§ 32.1 Statement of applicable law.

(a) Part B of the Urban Growth and New Community Development Act of 1970 (42 U.S.C. 4511 et seq.) authorizes the Secretary of Housing and Urban Development (acting through the Community Development Corporation for purposes of subparagraphs (1) through (4) of this paragraph and for such other activities mentioned below as he may prescribe) to:

(1) Guarantee the financial obligations issued by or on behalf of private new community developers and State land development agencies to help carry out new community projects approved by the Secretary, except that no obligation of any State land development agency may be guaranteed if the income from such obligation is exempt from Federal taxation;

(2) Make grants to State land development agencies the obligations of which are guaranteed under the Act in amounts not to exceed the difference between interest paid on such obligations and the interest on similar obligations, the income from which is exempt from Federal taxation;

(3) Make loans to private new community developers and State land development agencies to assist them in making interest payments on loans incurred to help finance new community projects approved by the Secretary, at interest rates no less than the interest rate on U.S. obligations of comparable maturity, plus one-eighth of 1 percent and at terms requiring commencement of repayment is not more than 15 years;

(4) Make grants to State land development agencies or to State or local public bodies having responsibility for providing services in approved publicly or privately developed new communities to pay for essential public services (including education, health, and public safety) during an initial period (not exceeding 3 years) prior to the completion of permanent arrangements for the provision of such services;

(5) Provide, either directly or by contract, or other arrangements, to private developers, State land development agencies, or State and local public bodies technical assistance to help them in planning and carrying out new community projects;

(6) Make grants to any State or local public body or agency to supplement Federal assistance that is otherwise available for urban mass transportation facilities, highway construction other than the Interstate System, airport development, hospital and medical facilities under the Hill-Burton program, public libraries, academic facilities for community and 4-year colleges, neighborhood centers, land and water recreation development, open space projects, water and sewer facilities, sewage treatment works, and similar public works and facilities in redevelopment areas designated by the Secretary of Commerce. These facilities must be necessary or desirable for carrying out an approved new community project. The amount of such grants may not exceed 20 percent of the cost of the facilities and in no case can the total Federal contribution to the cost of the facility exceed 80 percent of total cost. Applications for assistance in constructing the facilities must meet applicable requirements for basic grants under section 3 of the Urban Mass Transportation Act of 1964 (49 U.S.C. 1062); section 120(a) of title 23, United States Code (23 U.S.C. 120(a)); section 19 of the Airport and Airway Development Act of 1970 (49 U.S.C. 1701); title VI of the Public Health Service Act (42 U.S.C. 291); title II of the Library Services and Construction Act (20 U.S.C. 355a); section 5 of the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601–8); title VII of the Housing Act of 1961 (42 U.S.C. 1500); section 702 or 703 of the Housing and Urban Development Act of 1965 (42 U.S.C. 3102, 3103); section 8 of the Federal Water Pollution Control Act (33 U.S.C. 466e); section 306(a)(2) of the Consolidated Farmers Home Administration Act (7 U.S.C. 1926); section 103 or 104 of the Higher Education Facilities Act of 1963 (20 U.S.C. 713, 714); or section 101(a)(1) of the Public Works and Economic Development Act of 1965 (42 U.S.C. 3131).

(7) Make grants (until June 30, 1975) to State land development agencies and loans or grants to private developers of up to two-thirds of the cost of planning new community development projects, particularly planning work fully responsive to social and environmental problems or encouraging the use of new or advanced technology. Such loans or grants may be made for new community projects which have already been approved or have met initial feasibility criteria and, in the case of private new community developers, only for planning work which is in excess of that which would ordinarily be needed to establish final market, financial and engineering feasibility of comparable projects not subject to the special purposes of a new community approved under the Act.

(b) Upon specific authorization by the President and under applicable Federal law respecting the use of federally owned lands, the Secretary is also authorized to plan and carry out large-scale demonstration projects, which could serve as models for new community developments by other public and private developers.

(c) The Act amends: (1) Section 202(b)(4) of the Housing Amendments of 1955, as amended (42 U.S.C. 1492), to permit public facility loans without regard to the population limits otherwise applicable for facilities serving a new community development assisted under the Act; (2) section 24 of the Federal Reserve Act, as amended (12 U.S.C. 371), with regard to the authority of national banks to invest in obligations guaranteed under the Act; (3) section 5(c) of the Home Owners Loan Act of 1933, as amended (12 U.S.C. 1464) with regard to the authority of the Federal savings and loan associations to invest in obligations guaranteed under the Act; and (4) section 701 of the Housing Act of 1954 as amended (40 U.S.C. 461), to permit the Secretary to make comprehensive planning grants up to 75 percent of cost to official governmental planning agencies for planning areas where rapid urbanization is expected to occur on land developed or to be developed as a new community under the Act. Local planning agencies may plan for specific public works in connection with a new community, in addition to the normal planning activities carried out through 701 planning assistance under this section.

(d) Additional assistance to new communities may be available under other Federal laws, even though they do not refer specifically to the Act or to new communities. For example, public bodies may receive Federal assistance for water, sewer, open space, schools, urban transit, and other facilities which serve new communities. Federal assistance for private sponsors would generally be available on the same basis as in other communities. For example, qualifying private sponsors may receive assistance for sales, rental, and cooperative housing projects for lower income families pursuant to sections 235 and 236 of the National Housing Act as amended (12 U.S.C. 1715z and 1715z–1).

(e) It is the declared purpose of the Act to:

(1) Encourage the orderly development of well-planned, diversified, and economically sound new communities, including major additions to existing communities, and to do so in a manner that will rely to the maximum extent on private enterprise;

(2) Strengthen the capacity of State and local governments to deal with local problems;

(3) Preserve and enhance both the natural and urban environment;

(4) Increase for all persons, particularly members of minority groups, the available choices of locations for living and working;

(5) Encourage the fullest utilization of the economic potential of older central cities, smaller towns, and rural communities;

(6) Assist in the efficient production of a steady supply of residential, commercial, and industrial building sites at reasonable cost;

(7) Increase the capability of all segments of the homebuilding industry, including both small and large producers, to utilize improved technology in producing the large volume of well-designed, inexpensive housing needed to accommodate population growth;

(8) Help create neighborhoods designed for easier access between the places where people live and the places where they work and find recreation;

(9) Encourage desirable innovation in meeting domestic problems whether physical, economic, or social; and

(10) Improve the organizational capacity of the Federal government to carry out programs of assistance for the development of new communities and the

revitalization of the Nation's urban areas.

§ 32.2 Definitions.

For the purpose of the regulations in this part, the following terms shall mean:

(a) *Act.* Part B of the "Urban Growth and New Community Development Act of 1970." (Title VII of the Housing and Urban Development Act of 1970, 42 U.S.C. 4511 et seq.)

(b) *Secretary.* The Secretary of Housing and Urban Development or his authorized representatives.

(c) *General Manager.* The chief executive officer of the Corporation.

(d) *Corporation.* The Community Development Corporation established within the Department of Housing and Urban Development under the Act.

(e) *Private developer.* Any private entity organized in a form satisfactory to the Secretary for carrying out one or more new community projects.

(f) *Public developer (also referred to as State land development agency).* Any State or local public body or agency with authority to act as developer in carrying out one or more new community projects.

(g) *Developer.* Any public developer or private developer.

(h) *State* Any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of any of the foregoing.

(i) *Local public body or agency.* Any public body or agency, including a political subdivision, created by or under the laws of a State or two or more States, or a combination of such bodies or agencies.

(j) *Project.* The activities and undertakings required to carry out a program which is intended to result in a newly built community or a major addition to an existing community and which meets the eligibility standards set forth in section 712 of the Act and these regulations.

(k) *Land development.* The process of clearing and grading land, making, installing, or constructing waterlines and water supply installations, sewerlines and sewage disposal installations, steam, gas, electric lines and installations, roads, streets, curbs, gutters, sidewalks, storm drainage facilities, and other installations or work, whether on or off the site, which the Secretary deems necessary or desirable to prepare land for residential, commercial, industrial, or other uses, or to provide facilities for public or common use. The term "land development" includes the construction of public facilities, but does not include the construction of any other building unless it is (1) needed in connection with a water supply or sewage disposal installation or a steam, gas, or electric line or installation, or (2) is to be owned and maintained by residents of the new community under joint or cooperative arrangements approved by the Secretary.

(l) *Actual cost.* The costs (exclusive of rebates or discounts) incurred by a new community developer in carrying out the land development assisted under this Act. These costs may include amounts paid for labor, materials, construction contracts, land planning, engineer's and architect's fees, surveys, taxes, and interest during development, organizational and legal expenses, such allocation of general overhead expenses as are acceptable to the Secretary, and other items of expense incidental to development which may be approved by the Secretary. If the secretary determines that there is an identity of interest between the developer and a contractor, there may be included as a part of actual cost an allowance for the contractor's profit or risk an amount deemed reasonable by the Secretary.

§ 32.3 Information.

General information on the new community programs and instructions for applying for assistance under these programs, as well as information on other Federal programs which are related to new communities, may be obtained from the General Manager, Comunity Development Corporation, Department of Housing and Urban Development, Washington, D.C. 20410.

Subpart B—New Community Criteria and Standards

§ 32.5 Applicability of this part.

All public and private developers must comply with this subpart to receive assistance under the Act.

§ 32.6 General criteria for new communities.

In determining whether a given undertaking (otherwise eligible for assistance and consistent with the purposes of the Act) is a project for the purposes of the Act, the Secretary will apply the following general criteria:

(a) It must be designed to create a newly-built community or major addition to an existing community which includes most, if not all, of the basic activities and facilities normally associated with a city or town: Cultural, educational, and religious facilities, as well as housing, transportation, utilities, industry, commerce, open space and recreation;

(b) It must combine these diverse activities in a well-planned and harmonious whole, so as to be economically sound and create an environment that is an attractive place to live, work, and play;

(c) It must contribute to the social and economic welfare of the entire area which it will importantly affect;

(d) It must provide for the creation of a substantial number of jobs, both through development of the project and through the location of business enterprises within the project;

(e) It must provide a viable alternative to disorderly urban growth, helping to preserve and enhance desirable aspects of the natural and urban environment or so improving general and economic conditions in established communities so as to help reverse migration from these communities or rural areas;

(f) It must be designed to increase the available choices for living and working for the fullest possible range of people and families of different compositions and incomes (including a substantial provision for housing for persons and families of low and moderate income) and must be open to all, regardless of race, creed, color, or national origin.

§ 32.7 Specific eligibility criteria.

(a) *Types of eligible projects.* Generally, the following types of new communities may be assisted under the Act:

(1) Economic balanced new communities within metropolitan areas as alternatives to urban sprawl;

(2) Additions to existing smaller towns and cities which can be economically converted into growth centers to prevent decline and accommodate increased population;

(3) Major new-town-in-town developments within or adjacent to existing cities, including developments which would help renew center cities or have a beneficial effect on the city's tax base; and

(4) Free standing and self-sufficient new communities away from existing urban centers where there is a clear showing of economic feasibility, primarily built to accommodate population growth.

(b) *Size, location, and internal diversity*—(1) *Size.* No minimum or maximum population size, density or physical site area is prescribed for a new community qualifying under the Act, but its size must be significant in comparison with existing development or communities in the area in which it is located. Size and boundary determination may be influenced by the existence of natural features, political boundaries and existing development. Other determinants, such as market data indicating the potential for, and absorption rate of, residential, commercial, and industrial growth, through an extended development period necessary to result in a balanced and mature community shall be considered.

(2) *Access.* A new community must have accessibility to highways, airports, or other public transportation facilities commensurate with its size and the reasonably anticipated requirements of its population, industry, and commerce.

(3) *Relationship to surrounding development.* If a new community involves development which adds to an existing community or to an existing residential, commercial, or industrial area, both the old and new development will be considered in determining whether the new community qualifies for assistance under the Act. To qualify, however, the new development must be substantial, and the old and new elements must be carefully integrated. The resulting total new community must be planned as a whole and must be demonstrably different from that which existed before. An addition to existing development of housing alone, or commercial or industrial facilities alone, will generally not be considered sufficient for this purpose.

Whether or not the new community incorporates existing development it must take account of this development in internal planning and site location decisions.

(d) *Internal diversity.* Although a new community need not be completely self-sufficient, it must provide in a single area the housing, public and commercial facilities, and job opportunities normally associated with a city or town. In determining the degree of internal diversity for a given site, consideration will be given to adequacy of existing or projected facilities in the immediate area. However, the community may not consist simply of housing or of housing with a minimum of commercial facilities serving only the immediate needs of people for neighborhood shopping. Nor may a new community be predominantly an industrial or commercial development, with a minimum supply of new housing.

(e) *Internal development program.* A new community must have a general plan and program for its ultimate development designed to create and maintain an attractive and viable environment responsive to human needs. Among the factors which the Secretary will consider in evaluating the plan are the following:

(1) Suitability of the site for the proposed uses considering its location, size, topography, microclimate, and soil characteristics, and the harmonious relationship of these uses with surrounding development, and their protection against adverse physical encroachment;

(2) Effectiveness of the land use and transportation and circulation plans and population density and distribution in promoting harmonious interrelationships and optimum internal accessibility;

(3) Preservation and enhancement of natural features such as water bodies and steep slopes; establishment and maintenance of an accessible open-space network for conservation, natural beauty, and recreation; effectiveness of measures to prevent environmental pollution; reduction of hazards from flooding, soil instability, and earthquakes; minimization of noise problems; and application of HUD or applicable local standards, whichever are higher, with regard to construction in areas subject to such hazards and problems;

(4) Adherence to the policies of the National Environmental Policy Act of 1969 and any regulations promulgated thereunder;

(5) Adequacy (based on general and other facilities in the area) of public, community, commercial, and other important facilities either within or serving the community, including water, sanitary and storm sewers, streets, walkways, highways, and other transportation facilities, solid waste collection and disposal, gas, electricity, telephone, as well as recreational, health, educational, cultural, and religious facilities;

(6) Adequacy of controls and incentives for promoting and enforcing attractive land utilization, urban design, and architecture;

(7) Balanced phasing of all elements in the program on a schedule compatible with economic feasibility and geared to the timing of land acquisition, development, and disposition as reflected in the financial plan;

(8) The extent to which the plan contemplates significant use of advances in design and technology with respect to land utilization, materials and methods of construction and the provision of community facilities and services; and encourages desirable innovations in meeting social and economic problems;

(9) Adequacy of plans for provision of relocation assistance and payments to persons and business groups to the extent required by the development program; and, with regard to public bodies receiving grant or loan assistance, compliance with applicable Federal and State laws and regulations, including the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970;

(10) Adaptability of the plan to the various problems and alternatives which may arise as the development program proceeds and adequacy of the size of the initial land area which the developer owns or controls to permit the construction of a comparatively balanced community should future land acquisition prove to be infeasible;

(d) *Housing mix.* A new community must contain an adequate range of housing and a variety of housing types for both sale and rental for people of all incomes, ages, and family composition, including a substantial amount for people of low and moderate income during each major phase of residential development. The following factors, among others, will be considered in determining the sufficiency of housing mix:

(1) Existing and projected distribution of families by income and size for the region in which the project is located;

(2) Existing and projected housing supply and demand, particularly for low- and moderate-income housing, in the region and market area of the project; and

(3) Income and family characteristics of persons likely to be employed in the new community.

Existing housing in standard condition or proposed to be rehabilitated within the new community, as well as new construction may be considered in determining adequacy of housing balance. But whether this housing is to be newly constructed or rehabilitated, the new community program must include reasonable assurances that the units planned will actually be provided. If the development of a new community is to be carried out in stages, sites for low- and moderate-income housing shall be included in every major residential stage.

(e) *Community services and government.* (1) A new community must be provided with a full range of government and public services adequate to meet the needs of all its residents. Such services may be provided by State or local government, by community organizations, or by other appropriate entities. The use of general purpose units of government will ordinarily be favored in preference to special districts. If public facilities or utilites are to be operated by a non-public body, rates and charges, capital structure, rate of return, and methods of operation of the facility or utility must be regulated by a public body or by other means satisfactory to the Secretary.

(2) A new community need not be or constitute a separate political unit but may be governed through a county, city, town, or other existing political jurisdiction. Where it is contemplated that a developer or a developer-controlled organization or association will, during the course of development, perform functions normally performed by a general unit of government, provision should be made in the new community plan or plans for an orderly transfer of such functions to an appropriate governmental unit at the earliest appropriate time.

(f) *Area planning and development.* (1) The area within which a new community is to be situated must be covered by a comprehensive areawide plan or by ongoing planning promulgated or carried on by a duly authorized agency. The location of the new community and the internal development plan for the project must be consistent with such comprehensive plan or planning and must reflect consideration of any economic development programs, social plans, functional plans, and public works programs of relevant Federal, State, regional, city, or county agencies for the area in which the new community is located. The comprehensive plan or planning for the area must, in the Secretary's judgment, be sufficiently detailed to provide a reasonable basis for evaluating the relationship of the proposed new community to other plans (including State, local, and private plans) and activities involving area population, housing and development trends, and transportation, water, sewage, recreation, and other relevant facilities. In those areas where there is an areawide planning agency certified by the Secretary, consistency must be found between the planning performed by the certified agency and the new community.

(2) There should be continued planning coordination by the developers with the local or areawide planning agency.

(g) *Governmental reviews and approvals.* The developer must secure all State and local reviews and approvals required by law or determined by the Secretary to be necessary for the project. To the extent significant project activities will require, or depend upon future approvals that are necessarily unobtainable at the time the offer of commitment is made or the project agreement entered into, the Secretary will require that the project plan or plans provide reasonable assurance that such approvals will and can be secured in a timely fashion, as needed. Unless otherwise specified by the Secretary, such assurance will include the adoption by the local governing

body of a resolution, in a form satisfactory to the Secretary, approving the new community program.

(h) *Social elements.* In order to assure that projects reflect social considerations and human needs, new community development programs must reflect or incorporate the following:

(1) Use of citizen advisory groups, opinion surveys, or other methods of improving communications and developing a design and structure for the new community that will be responsive to the needs of residents, both at the beginning and, through continuing evaluation, at later stages of development; and adequacy of provision for public hearings and opportunity for comment by local residents affected by the project;

(2) Location and distribution of housing types and price ranges so as to prevent segregation and afford full access to facilities, and participation in activities, of the community and neighborhood by groups, families, and individuals of different economic, social, and racial backgrounds;

(3) A program of citizen participation in project activities, including use of home associations and civic organizations (acceptable to the Secretary) appropriately formulated to supplement, as necessary, opportunities offered by governmental or public institutions, and to provide for full opportunity for participation by renters and low-income residents;

(4) Specific actions that may be needed to promote high quality schools or to encourage or assure, as appropriate, establishment of community colleges, technical or vocational education centers, adult education courses, and job retraining facilities; and

(5) In cases where the developer is directing the Project to the needs of the aged or physically handicapped, the adequacy of special facilities to serve these families and persons and the provision of a barrier free environment to facilitate their free movement and self-sufficiency.

(i) *Disclosure of certain interests.* Developers and contractors must disclose, in accordance with such procedures or forms as the Secretary may prescribe, all direct and indirect interests that may affect the arm's length character of any transaction relied upon to establish estimated or actual costs, or value, for purposes of determining the amount of obligations to be guaranteed or the amount of the proceeds of such obligations that can be disbursed. Where such interests exist, the Secretary may fix such special allowances or fees, or require special accounting for costs, or take such other actions as he may determine are reasonable and appropriate in order to prevent the guarantee of obligations, or the disbursement of funds, in excessive amounts.

(j) *Staging.* Major new community projects will ordinarily be planned, carried out, and financed in progressive stages, so as to provide an opportunity to test the market and minimize financial risk, with each stage resulting in a balanced development. Exceptions to this requirement, and the degree of and terms for staging, will be determined according to the scope of the project, the nature of market demand, the extent of assurance that all contemplated financing will be obtained and all public actions or approvals taken or obtained, the degree to which economies of scale can in fact be obtained, the possible adverse effects of contemplated major improvements upon the Government's security, the projected scheduling of housing in relation to critical housing needs, particularly needs for low- and moderate-income housing, and such other matters as the Secretary deems relevant. Regardless of the stage covered in the initial application, the developer must submit a general plan for the entire project which will be covered by subsequent stages.

§ 32.8 Other requirements for new community development.

(a) Capability of developer:

(1) The developer must have or show that he will have financial, technical, and administrative ability and background appropriate to the size and complexity of the project, the amount of the obligations to be guaranteed or other assistance given, and the period of time for project completion. The developer must have either in its own organization or available to it land development and related skills of a high order over the whole period of development. It must also have the capacity for anticipating and dealing effectively with the social concerns and problems that must be considered in planning the community or that may arise during the period of development.

(2) Private developers include profit-seeking, nonprofit, or limited dividend entities. The form of organization (including provisions for continuance) of a private developer and changes in that form must be approved by the Secretary. Changes in ownership which might result in changes in control of the developer's operation must also be approved.

(3) Private developers may engage in non-Title VII activities, either in the project itself or in related development, subject to such conditions as the Secretary may impose. The project agreement shall impose such controls and limitations as the Secretary shall determine are required to (i) govern the non-Title VII activities of the developer, in the project itself or otherwise, or (ii) provide separation of accounts and activities to serve the purposes of the Act and protect the financial interests of the United States.

(4) While public developers may engage in non-Title VII activities, they must provide for separate accounting for each new community project and provide assurances that revenues obtained from the project will be invested in the project to the extent necessary to insure that principal, interest and any redemption premiums on indebtedness will be paid when due and that the new community will be developed in a sound and economical manner.

(5) Public developers must have power and authority and be organized in a form adequate to carry out the appropriate purposes and the requirements of the Act and the regulations in this part.

(b) Equal opportunity:

(1) The new community project must be specifically designed and implemented so as to assure compliance with all requirements imposed by, or pursuant to, any applicable statute or executive order treating with discrimination on the basis of race, creed, color, sex, or national origin. These include title VIII (Fair Housing) of the Civil Rights Act of 1968 (42 U.S.C. 3601–3619); titles VI and VII of the Civil Rights Act of 1964 (42 U.S.C. 2000d and 2000e); the Civil Rights Act of 1866 as amended (42 U.S.C. 1981 and 1982); section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1715); Executive Order 11063 (27 F.R. 11527); and Executive Order 11216, as amended by Executive Order 11375 (30 F.R. 12319, as amended by 32 F.R. 14303); which apply variously so as to prohibit discrimination in the use, sale, lease, or other disposition of land, housing, or facilities in the new community and in employment in the new community or in the development of the new community project. Pursuant to the authority in each executive department to issue regulations and take other appropriate action under Executive Order 11063 with respect to its programs, discrimination on the basis of race, color, creed, or national origin in the use, sale, lease, or other disposition of any land developed for residential or related uses with assistance under the Act is hereby specifically made a violation of that order enforceable under the terms of section 302 of the order after due notice and hearing.

(2) In furtherance of subparagraph (1) of this paragraph and as a condition of granting or continuation of assistance, the developer must formulate and implement an affirmative action program. Such a program shall include, but not be limited to, appropriate marketing practices, cooperation with civil rights and civic groups, and inclusion of equal opportunity provisions in pertinent contracts, subcontracts, covenants, and other documents. The developer shall take such further steps as the Secretary may direct to carry out the program, including, but not limited to, provision of equal opportunity in employment and housing and encouragement of minority entrepreneurs, including minority contractors, by encouraging their participation in the construction of the Project and provision of business service.

(c) Labor standards:

(1) All laborers and mechanics employed by the developer or by contractors or subcontractors in land development assisted under this part shall be paid wages not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor, in accordance with Davis-Bacon Act, as amended (40 U.S.C. 276a–276a–5). No assistance shall be extended under this part for any project without first obtaining adequate assurance that these labor

standards will be maintained upon the construction work involved in such project. The Secretary of Labor shall have, with respect to the labor standards specified in this paragraph, the authority and functions set forth in Reorganization Plan No. 14 of 1950 (64 Stat. 1267) and section 2 of the Act of June 13, 1934 (40 U.S.C. 276c). No proceeds of new community obligations guaranteed under this part may be disbursed to a developer with respect to land development construction unless these labor standards have been complied with to the satisfaction of the Secretary.

(2) The Secretary shall prescribe that: (i) All construction contracts and subcontracts for land development assisted under this part contain labor standards clauses in furtherance of the Act and of the applicable regulations of the Secretary of Labor; (ii) the developer comply with the provisions of said labor standards clauses; (iii) the provisions of the regulations of the Secretary and the Secretary of Labor with respect to ineligible contractors be observed; and (iv) such certification be filed as necessary to assure compliance with the provisions of said labor standards clauses;

(d) In any new community project, there must be provision satisfactory to the Secretary to

(1) Help maintain a diversified, local homebuilding industry;

(2) Increase the capability of all segments of the homebuilding industry, including both small and large producers, to participate through the increased supply of building sites at reasonable costs and through improved technology, in producing the needed large volume of well-designed, inexpensive housing; and

(3) Encourage broad participation by the homebuilding industry, particularly small builders.

Subpart C—Financial and Economic Criteria and Standards

§ 32.10 Applicability.

Developers must comply with all sections of this subpart to qualify for a loan or guarantee and must comply with §§ 32.11 and 32.12 to qualify for other assistance under the Act.

§ 32.11 Economic feasibility.

A new community must be economically feasible in terms of economic base or potential for growth. Among the criteria by which feasibility will be determined are the following:

(a) Current and projected economic and demographic growth patterns and demand for and supply of industrial, commercial, and residential properties for the region in which the project is located;

(b) The market area of the project and the growth and demand trends projected within this market area;

(c) The advantages of the project, relative to other developments, including its location, the managerial and marketing skills associated with it, and its capacity to sustain a job base which, in turn, will generate demand for housing and commercial facilities.

In the case of projects in rural and other areas, including those beyond the urbanizing portion of a metropolitan area, where, for economic or other reasons, advantage cannot be taken of existing growth trends, it is particularly important that there will be a large enough employment base to generate demand to sustain the projected growth rate of the new community. Feasibility will depend upon commitments from industry and government public works projects; the basic conditions for industrial development; and the probable effectiveness of private and governmental efforts to attract stable industries and to overcome some of the major obstacles to economic development.

§ 32.12 General financial plan and program.

A new community must be developed pursuant to a financial plan or program which must include provisions that will:

(a) Cover all anticipated project costs, including, but not limited to, costs which will be met with funds to be borrowed under the obligations guaranteed;

(b) Demonstrate the manner by which, and the sources from which, these costs will be met, including anticipated revenues from the project, financial resources of the developer, and borrowing;

(c) In the case of a private developer, provide assurances that the developer will have an adequate incentive, in terms of equity invested and expected return, for completing the approved project in an expeditious and efficient manner;

(d) Set forth a procedure for periodic updating of the financial plan to take into consideration changes in costs, revenues, market conditions, and other relevant changes affecting the plan; and

(e) Provide assurances that the project will not have an adverse long-term fiscal impact on the surrounding political jurisdiction.

§ 32.13 Maximum Federal guarantee.

(a) The maximum outstanding indebtedness for any project which may be guaranteed under the Act shall involve a principal obligation: (1) In the case of a public developer not exceeding 100 percent of the sum of the Secretary's estimate of the value of the real property before development and his estimate of the actual cost of the land development, or (2) in the case of a private developer, not exceeding the sum of 80 percent of the Secretary's estimate of the value of the real property before development and 90 percent of his estimate of the actual cost of the land development. In no event shall the principal amount of the outstanding obligations guaranteed under the Act with respect to a single project exceed $50 million.

(b) Land which is yet to be acquired and costs which are yet to be incurred at the time a commitment is made may be included as a basis for determining maximum commitment, but, in the absence of escrow or trust provisions only land acquired and costs incurred at or prior to issuance of a guarantee may be included as a basis for determining the maximum outstanding principal amount of obligations which may be guaranteed.

(c) No obligation of any State land development agency shall be guaranteed under the Act if the income from such obligation is exempt from Federal taxation. The Secretary may make grants and contract to make grants to any public developer in an amount which does not exceed the difference between the interest paid on its obligations guaranteed under the Act and the interest on similar obligations the income from which is exempt from Federal taxation.

§ 32.14 Loans.

(a) The maximum principal amount of direct interest loans to State land development agencies and private developers will be determined by the Secretary's estimate of the interest costs on indebtedness to finance land acquisition and land development costs during the initial period of development. This period (not to exceed 15 years) shall be the period the Secretary estimates to be prior to the time when land marketing activity is of sufficient volume to permit continued development of the project without further loans under this section. Any loan under this section shall be repaid, with interest in terms and conditions satisfactory to the Secretary, commencing at such time as development progress and marketing permit repayment, but commencing not later than 15 years after the date such loan is made. Loans under this section shall bear interest at a rate specified by the Secretary which shall not be less than a rate determined by the Secretary of the Treasury taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loans, plus one-eighth of 1 percent. Among other factors in determining the interest rate to be charged, the Secretary will take into account the risk of default on the loan and availability of security against such risk. The principal amount of the loans outstanding at any time under this section with respect to a single new community project shall not exceed $20 million.

(b) In the absence of a finding by the Secretary of exceptional need, interest loans and guarantees will not be available to assist the same project.

§ 32.15 Real estate appraisals.

Appraisals of real estate in connection with interest loans or guarantees of developer's obligations will be made by qualified real estate appraisers acceptable to the Secretary. An independent appraisal shall be furnished with the developer's application for guarantee or loan assistance under this part and may be supplemented by additional appraisals undertaken or commissioned by the Secretary at his discretion. Appraisals, regardless of source, are subject to review, modification, and acceptance by the Secretary. Appraisals will be made in accordance with instructions issued by the Secretary from time to time and in accordance with the following principles:

(a) *Value before development.* (1) Estimates of the "as is" value of the property must be based, to the extent possible, on the principle of substitution using as data recent arm's length sales transactions of comparable properties. Unusually high prices paid for parcels to round out a larger holding will be considered as unrepresentative of value of the whole. Parcels will be appraised for their highest and best use for which there is a current market as contrasted to a projected use for some period in the future. (2) The proposed development as a new community, or the financing expected under the Act should not be considered in determining the "as is" value of the real property. The highest and best use assumed should reflect only normal growth that would be expected in any event. The appraiser may, however, consider the effect of improvements completed or under construction prior to guarantee or loan assistance, and changes which have occurred in zoning and comprehensive planning through actions of the developer. The developer shall furnish to the Secretary schedules of acquisition dates and prices paid or option prices in the last arm's length transaction involving the properties controlled by the developer. The Secretary may, at his discretion, make available to the appraiser such part of this information as he deems relevant as appraisal data. In all cases where land valuations exceed actual prices paid by the developer or paid in the latest arm's length transaction, the reasons for the valuations will be fully explained and documented.

(b) *Value during development.* Any appraisals undertaken during the development period will be performed in accordance with the then current instructions issued by the Secretary.

§ 32.16 Costs of and revenues from land development.

(a) *Costs.* For the purposes of estimation of and certification of actual costs of land development, only those of actual cost of land development included in the definitions of these terms in § 32.2 (k) and (l) may be considered:

(1) Estimated and certified actual costs may include costs incurred prior to the date of the Secretary's estimate of value of real property before development only to the extent that they are not reflected in such estimate of value. Taxes, interest, principal payments, and other carrying charges on the real property incurred or accrued prior to that date may not be included.

(2) Construction costs estimates, to the fullest extent feasible, should be supported by detailed engineering cost figures broken down by unit quantities and prices, and must be identified in terms of specific improvements. Other costs of land development including overhead must be fully supported and detailed.

(3) Fees and charges payable pursuant to Subpart E of this part before or during development may be included as estimated actual costs.

(b) *Revenues.* The basis upon which anticipated revenues are computed should be fully documented so as to enable the Secretary to judge the validity of the cash flow projections and, in the case of land sales, should take into account the anticipated position of the project at the completion of each phase of planned development.

§ 32.17 Terms and conditions of borrowing guaranteed or for which interest is loaned.

(a) *Kind of obligations.* The obligations guaranteed or with respect to which interest loans are made under the Act may include any bond, debenture, note, or other obligation issued by a developer for public or private sale. To facilitate public financing, the guaranteed obligations of any number of developers may be issued to a trustee who will sell to the public, through underwriters or otherwise certificates of participation or other securities evidencing rights in the guaranteed obligations held in trust, provided that the terms and conditions of each such transaction shall be approved by the Secretary.

(b) *Investors and lenders.* Investors in guaranteed obligations or obligations with respect to which interest loans are made, except for public offerings, must be approved by the Secretary or must meet such standards and criteria as may be from time to time prescribed by him. In the case of a public offering, obligations must be underwritten under terms and conditions approved by the Secretary.

(c) *Rates of interest and maturities.* Rates of interest and any other charges relating to guaranteed obligations or obligations with respect to which interest loans are made, and the repayment maturity and redemption privilege provisions of such obligations must be approved by the Secretary.

(d) *Trustees and fiduciaries.* Any trustee or other person or corporation acting in a fiduciary capacity on an interest loan or with respect to a guaranteed obligation must be a banking or other financial institution subject to governmental inspection and supervision. Approval of such a trustee or other person may be conditioned on its written agreement with the Secretary to take such steps and act under such conditions as the Secretary may prescribe for the protection of the security interests of the United States.

§ 32.18 Equity and working capital.

(a) Prior to the execution of the project agreement a developer must make arrangements satisfactory to the Secretary to assure that there will be adequate funds and working capital to meet cash requirements for costs and contingencies, not covered by the proceeds of guaranteed obligations or interest loans incurred or to be incurred in connection with the land development program.

(b) The Secretary may require developers to have equity in addition to funds described in paragraph (a) of this section, according to the amount of and arrangements for debt financing, and such other considerations as he determines may bear upon the risks to the United States as guarantor or lender.

§ 32.19 Security for the guarantee and interest loans.

(a) All obligations guaranteed under the Act or with respect to which interest loans are made under the Act must contain, or be issued subject to, such provisions relating to the security interests of the United States as may be required by the Secretary. These shall include general provisions under which the United States shall acquire rights of subrogation on payment of a guarantee in addition to such special provisions relating to the security of the United States in the specific property, including real property being acquired and developed, or other property as may be appropriate.

(b) Unless otherwise required or approved by the Secretary, the security of the United States for guarantees will include a first lien on the real property of the developer (or such portion thereof as the Secretary may determine) owned or acquired in connection with the project. Whether property is used as security for a Federal loan or for a guarantee, the developer's title to such property and the validity of such lien must be evidenced by a title insurance policy issued by a title insurer licensed to do business in the State in which the real property is located and acceptable to the Secretary, or other satisfactory evidence of title. The form and amount of any title insurance policy shall comply with the standards prescribed by the Secretary. At, or prior to, the issuance of obligations guaranteed under the Act, the lien or other security shall be given to and held by the Secretary, or by a trustee approved by him. The instruments creating such lien and setting forth the terms and conditions under which it is given and held must be satisfactory to the Secretary. The Secretary may require, notwithstanding any provision of law, the developer to contract for the extinguishment upon default of any or all redemptions, equitable, legal or other rights, title and interest of the developer in connection with property subject to any mortgage, deed, trust or other instrument held by or on behalf of the Secretary for the protection of the security interests of the United States.

(c) Such instruments shall include provisions for the release of real property from the lien, as such property is sold or otherwise disposed of for project purposes, in accordance with such schedules and procedures as the Secretary may require in the project agreement to assure that the sale or other disposition of such property (1) adequate release payments will be applied to the redemption of the guaranteed obligations or paid into an appropriate fund, or (2) other appropriate action will be taken or assurances received as may be required to protect the security interests of the United States.

Circular A-95. Detailed instructions for compliance will be provided at the time of inquiry as provided in § 32.22. In general, Circular A-95 requires that any organization undertaking to apply for assistance under programs subject to the Circular notify the appropriate clearinghouse(s) for the area in which the project is located of its intent to apply for assistance for the purpose of affording the clearinghouse(s) and interested agencies in the area an opportunity to comment on the proposed project. At the time a proposal is submitted to HUD, it should also be submitted to the appropriate clearinghouses. An application will not be accepted by the General Manager unless it is accompanied by evidence of compliance with Circular A-95. Only under special circumstances will modifications in the time of the requirements be made.

(2) Full compliance will be required with the provisions of Public Law 91-190 (The National Environmental Policy Act of 1969) regarding public and agency review of the impact of new community projects upon environmental quality.

(c) *Offer of commitment.* If the determinations referred to in paragraph (a) of this section are made by the Secretary and an application is approved by him hereunder, the Secretary (acting through the Community Development Corporation) may address a letter to the applicant stating in effect that, based upon the information contained in the applicant's proposal and application and any other information which may have been submitted by the applicant, the Secretary (acting through the Community Development Corporation) is prepared to enter into an agreement providing for the guarantee under the Act of a specified maximum principal amount of obligations to be issued by a specified developer or providing for a specified maximum principal amount loans under the Act in respect to interest on obligations to be issued by a specified developer, subject to approval by the Secretary of

(1) The initial investors (in the case of a private sale of such obligations) or the terms and conditions of the underwriting (in the case of a public sale of such obligations);

(2) The rate of interest to be borne by such obligations or the formula by which such rate will be determined;

(3) The repayment and maturity provisions of such obligations;

(4) The specific measures for the protection of the security interests of the United States, liens and releases of liens, and payment of taxes; and

(5) All other terms and conditions of the financing arrangements which might affect the interest of the United States; and subject to such further conditions as the Secretary may prescribe.

(d) *Acceptance of offer of commitment.* The offer to commit contained in any such letter shall expire 120 days after the issuance thereof unless accepted by the applicant prior to such expiration by payment of the commitment charge specified in § 32.34 and meeting such conditions to acceptance as the Secretary may impose. Within 90 days after the expiration of such offer to commit, it may be reopened and accepted by the applicant by request in writing to the Secretary accompanied by tender of the commitment charge and the reopening charge, if the Secretary in his discretion approves such a request. An accepted offer to commit shall remain effective as a commitment to enter into a project agreement pursuant to § 32.24 for 6 months, at which time the commitment shall expire unless the applicant has taken all steps that the Secretary determines to be required under this part as a prequisite to the execution of such project agreement or unless such 6-month period is extended at the discretion of the Secretary.

§ 32.24 Project agreement.

Following satisfaction of all conditions stated in any commitment of the Secretary, and before the making of any guarantees, interest grants, or interest loans, the developer will be required to enter into a Project Agreement which shall be in a form satisfactory to the Secretary. The agreement shall set forth the understandings of the Secretary and the developer with respect to the entire project, including the understandings, if any, as to how the project is to be carried out in stages. The agreement shall also set forth the developer's Agreement to carry out the project in accordance with specified plans, as approved by the Secretary, and the Secretary's agreement to guarantee obligations of the developer issued pursuant to those plans, to make interest grants (in the case of a public developer), to make interest loans to the developer, or to combine such forms of assistance, subject to the limitations set forth in the Act and this part. The agreement (or a related agreement) shall further include:

(a) An express covenant to the effect that the Government's interests in the project are not limited to its financial interests but extend to accomplishment of the public purposes of the Act;

(b) Provisions setting forth the duties and responsibilities of the developer with respect to parts or portions of the project which will not be carried out by the developer;

(c) Provisions governing the security to be provided to the United States;

(d) Provisions setting forth the rights and remedies of the United States in the event of default, including rights to seek injunctive or other equitable relief;

(e) Special provisions as necessary to assure compliance with equal opportunity, labor standards, and other particular requirements;

(f) Duties of the developer to provide information, data, and reports as required by the Secretary; to maintain adequate books and records; and to permit and provide as necessary for inspections and on-site examinations by or on behalf of the Secretary; and

(g) Such other provisions as the Secretary may require as necessary or appropriate to assure adherence to the project as approved or to the provisions of the Act or of this part, or to protect the Government against loss.

§ 32.25 Issuance of guaranteed obligations.

Pursuant to the project agreement and upon satisfaction of the conditions specified in such agreement, the Secretary will endorse his guarantee upon obligations duly issued by the developer pursuant to a purchase or underwriting agreement aproved by the Secretary, will make interest grants (in the case of a public developer) or will make interest loans. The guarantee fee specified in § 32.36 must be paid at the time any guarantee is made, subject to waiver at the discretion of the Secretary in the case of obligations issued by a public developer in respect of which the Secretary determines that the interests of the United States are protected by appropriate recourse to, or other arrangements with, State or local governments.

§ 32.26 Disbursement of loans.

Interest loan funds will be disbursed on schedule with the certification of interest payments.

§ 32.27 Project execution and monitoring.

(a) *Inspections and reports.* To insure that the project is being executed in a manner consistent with the objectives of the Act and as provided in the project or other agreements, the developer will be required to submit periodic financial and other reports on project execution The Secretary will also be afforded access to the project site at all reasonable times for purposes of inspection.

(b) *Records.* The developer must maintain, to the satisfaction of the Secretary, records of all costs incurred for the project and must require his contractors and subcontractors to maintain similar records. Upon request, all records and all agreements relevant thereto shall be made available at all reasonable times for examination by the Secretary. Insofar as such records and agreements relate to any grants, loans, or guarantees made pursuant to this part, the financial transactions of recipients of Federal assistance may be audited by the General Accounting Office under such rules and regulations as may be prescribed by the Comptroller General of the United States. The representatives of the General Accounting Office shall have access to all books, accounts, records, files, and all other papers, things, or property belonging to or in use by such recipients pertaining to such financial transactions and necessary to facilitate the audit.

(c) *Amendments.* As a result of changes in market demand, employment patterns, costs and revenues or other factors or conditions, it may become desirable to make certain amendments to the plans initially approved by the Secretary. All proposals for amendments by the developer must be submitted to the Secretary for approval, together with full justification therefor. Such approval will

§ 32.20 Terms and conditions of payment under guarantees.

(a) *Nature and scope.* The full faith and credit of the United States is pledged to the payment of all guarantees made under this section with respect to principal, interest, and any redemption premiums. Interest includes that which accrues between the date of default under a guaranteed obligation and the payment thereof in full. Any such guarantee made by the Secretary shall be conclusive evidence of the eligibility of the obligations for such guarantee, and the validity of any guarantee so made shall be incontestable in the hands of a holder of the guaranteed obligation.

(b) *Claims and payment upon default.* Upon default by a developer in payment of interest or premium on or principal of an obligation guaranteed under the Act, the first recourse of the holder thereof shall be a claim under the guarantee for payment of the defaulted interest, premium, or principal; and upon payment thereof in accordance with the terms of such guarantee, the holder shall have no further recourse. All payments thereunder shall be made in cash from the revolving fund established pursuant to the Act.

§ 32.21 Use of proceeds of guaranteed obligations.

(a) *Land valuation and cost certification.* Disbursements to the developer of proceeds of guaranteed obligations must be supported by the prior submission of a certificate of actual costs and approved by the Secretary. Disbursements may be approved by the Secretary. Disbursements may be approved by the Secretary only for the actual costs of land development as the terms are defined in § 32.2 (k) and (l). Disbursements may also be approved for actual costs of project real property acquisition after the date of the project agreement. Disbursements for real property acquired prior to the date of the project agreement will be approved on the basis of the Secretary's estimate of value of real property before development. Certification of actual costs must be in a form satisfactory to the Secretary and be accompanied by such documentation as he may deem necessary to assure that such costs have actually been incurred and are eligible for financing under the Act. If it is expected that guaranteed obligations will be issued and sold in anticipation of land acquisition or of costs for land development incurred in the future, appropriate provisions must be made for escrow or trusteeship of the proceeds of sale to the extent and so long as disbursement of such proceeds is unsupported by valuation of land actually acquired or certification of actual costs incurred. If there is an identity of interest between the developer and a contractor, the Secretary may require the contractor to separately certify actual costs and may include as a part of actual cost a reasonable allowance for the contractor's profit or risk.

(b) *Limitation on disbursements.* Funds to be derived from obligations which the Secretary has guaranteed or agreed to guarantee shall be disbursed or made available to the developer in accordance with limitations as to disbursements approved by the Secretary. Such limitations shall be based upon project needs, the progress of work completed as against work planned, the maintenance by the developer of required equity and working capital, the possibility of overruns or unanticipated costs, the extent to which allowable land values exceed land costs, and such other matters as the Secretary may deem relevant. Amounts properly allowable and credited, but withheld pursuant to such limitations and not otherwise paid to the developer for approved purposes, will be made available upon conclusion of the project, or the stage of a project to which such amounts relate, or are apportioned, as the Secretary may determine.

Subpart D—Procedures

§ 32.22 Preapplication proposal.

The preapplication procedure for interest loans, guarantee assistance, and for determination of general eligibility under the Act to qualify for the other financial assistance is designed to provide an initial screening, prior to submission of detailed plans by the developer, to determine whether or not a project appears to comply with the broad intent of the Act. It will also provide the General Manager, Community Development Corporation, an opportunity to work with the developer from the earliest stages of project planning.

(a) *Inquiry.* After familiarizing themselves with the Act and the regulations in this part, applicants are encouraged to meet with the General Manager, or his designated representatives to discuss their proposals, so that subsequent steps may be taken with a clear understanding of the goals and requirements of the program.

(b) *Proposal.* The first formal step in processing is submission of a preapplication proposal to the General Manager, Community Development Corporation, U.S. Department of Housing and Urban Development, Washington, D.C. 20410. The proposal should deal in summary form with the criteria for project evaluation set forth in Subparts B and C of this part. The proposal need not include the detailed supporting data required for an application. Specific instructions regarding the items which must be included in a proposal may be obtained from the General Manager. No charge is required upon submission of a preapplication proposal.

(c) *Review and action.* The General Manager upon completion of his review of each proposal, will inform the applicant in writing of his findings and (1) state his willingness to consider an application; or (2) state his willingness to consider an application, indicating the need for specific changes in the project; (3) recommend the resolution of certain critical problems before proceeding with an application; or (4) discourage an application, indicating the aspects of the proposal which do not appear to meet the requirements of the Act. Acceptance of an application does not constitute or imply an assurance of eventual approval. If the applicant is not encouraged to submit an application, but nevertheless believes that the project may qualify under the Act, he may resubmit the proposal for further review with such changes as, in his opinion, will overcome the initial objections of the General Manager.

(d) *Special planning assistance.* Applications for special planning assistance described in § 32.1(a)(7) may be submitted by public and private developers at any time, but will not be acted upon until the Secretary has indicated his willingness to accept an application for interest loans, guarantee assistance or for determination of general eligibility under the Act pursuant to paragraph (c) of this section. Private developers must demonstrate that planning funds requested under this section are needed, will serve the purposes of the Act and will supplement normal activities which would be needed in any event. In determining whether a public body should receive these special funds, consideration will be given to relative need, and the degree to which the project serves the purposes of the Act. Instructions for special planning assistance applications may be obtained from the General Manager.

§ 32.23 Application.

(a) *Submission.* An application for interest loan, guarantee assistance, or determination of general eligibility may be submitted to the General Manager pursuant to instructions received in accordance with § 32.22 and upon payment of the application charge specified in § 32.33. The application for loan and guarantee assistance must contain information adequate to enable the Secretary to make the determination that the criteria covered in Subparts B and C of this part have been met; applications for other assistance under the Act must cover information contained in Subpart B and §§ 32.11 and 32.12 of Subpart C of this part, with appropriate supporting data for economic and financial feasibility. An application for guarantee assistance submitted by a public developer should incorporate any application for related interest grants described in § 32.1(a)(2). Specific instructions regarding the items which must be included in an application may be obtained from the General Manager. Such items may, in addition to other matters, include information as to a range of feasible interest rates on, and alternative repayment schedules and maturities of, the obligations to be guaranteed or in respect of which interest loans are to be made, subject to further determinations in accordance with paragraph (c) of this section.

(b) *Compliance with OMB Circular A-95 and Public Law 91-190.* (1) Except as indicated below, assistance under the Act is subject to compliance with the provisions of Attachment A, Part I of the Office of Management and Budget

be based upon the same criteria, and will take account of the same purposes, as are set forth in this part for consideration of the initial application. The Secretary may recommend, or require, subject to conditions set forth in the project agreement, amendments to an approved plan when, in his opinion, such amendments are necessary or desirable to insure the financial stability of the project or to prevent situations which would impair the value of the project or its ability to carry out the purposes of the Act.

§ 32.28 Supplementary grants.

Applications for the basic grants described in § 32.1(a)(6) should be made to the office having authority to make such basic grants. Application for any of the supplementary grants for public facilities described in that Section may be made by an eligible State or local public body at or subsequent to the making of an application for basic grant assistance under any of the programs authorized by legislative provisions cited in that Section and should be made to the General Manager. A copy of the application for basic grants should also be filed by the applicant with the General Manager, Community Development Corporation, U.S. Department of Housing and Urban Development, Washington, D.C. 20410. Instructions for supplementary grant applications may be obtained from the General Manager. A contract for supplementary grant assistance will be entered into only upon (a) a determination by the Secretary that the project for which assistance is requested is necessary or desirable for carrying out a project in accordance with the requirements of Subpart B and §§ 32.11 and 32.12 of Subpart C of this part; (b) execution of a contract or other commitment for the related basic grant assistance by a duly authorized government official, and (c) execution of an agreement with the developer as discussed in § 32.24.

§ 32.30 Multiple forms of assistance.

Except as specified in § 32.14(b), the award of any form of assistance provided under this part shall not in itself exclude the availability of any other form of assistance under this part. Except as specified in § 32.22(d) the availability of any form of assistance under this part is not conditioned upon action taken with respect to any other form of assistance under this part. If supplemental or public service grant assistance is sought in the absence of guarantee or loan assistance, the Secretary may impose such requirements and enter into such agreements as he deems appropriate to insure that the development of a new community project proceeds in accord with an approved new community program.

§ 32.31 Projects initiated under the New Communities Act of 1968.

A new community development project for which a commitment of guarantee assistance has been offered under the New Communities Act of 1968 shall be deemed to have met the eligibility requirements of Subparts B and C of this part, for purposes of guarantee assistance; as to any outstanding portion of such commitment, the developer may elect to proceed under the Act and this part or to proceed under the New Communities Act of 1968 and regulations thereunder. Such developers who wish their projects to qualify for other assistance under the Act should contact the General Manager as to additional requirements. All preapplication proposals, applications, and materials in support thereof submitted in respect of projects for which no commitment has been offered under the New Communities Act of 1968 shall be deemed submitted under the Act and this part.

Subpart E—Fee and Charge Schedule

§ 32.33 Application charge.

An application charge of $10,000, nonrefundable, shall accompany any application for interest loan, guarantee assistance, or determination of eligibility under the Act by a public or private developer.

§ 32.34 Commitment charge.

A commitment charge equal to 0.5 percent of the principal amount of the guarantee or interest loan commitment by the Secretary up to $30 million, and in addition, 0.1 percent of the principal amount above $30 million, shall be paid upon acceptance of an offer of commitment or at the time a guarantee or interest loan is made, whichever occurs first. Should the project become impractical, infeasible, or impossible to undertake, the Secretary may refund such portion of the commitment charge as he deems equitable.

§ 32.35 Reopening charge.

A reopening request pursuant to § 32.23(d) shall be accompanied by a charge of 0.05 percent of the expired offer of commitment for interest loan or guarantee assistance. An offer of commitment which has expired because of the failure to pay the commitment charge may be reopened and accepted only upon payment of the commitment charge and the reopening charge.

§ 32.36 Guarantee fee.

A guarantee fee equal to 3 percent of the principal amount of guaranteed obligations shall be paid at the time of the issuance of such obligations, subject to waiver at the discretion of the Secretary in the case of obligations issued by a public developer as provided in § 32.25.

§ 32.37 Annual fee for guarantees.

An annual fee equal to 0.5 percent of the average principal amount of guaranteed obligations outstanding during the preceding year shall be paid on the first anniversary date of the guarantee, until the seventh such date; and, thereafter, an annual fee of 1 percent of the average principal amount of guaranteed obligations outstanding during the preceding year shall be paid on each subsequent anniversary date of the initial guarantee until the total obligation is paid in full: *Provided*, That such annual fees may be waived at the discretion of the Secretary in the case of obligations issued by a public developer in respect of which the Secretary has waived the guarantee fee.

§ 32.38 Transfer charge.

Upon application for approval of a case involving the substitution of developers, a transfer charge of 0.05 percent of the unused portion of the the commitment for interest loan or guarantee assistance shall be paid.

Issued at Washington, D.C., July 28, 1971.

GEORGE ROMNEY,
Chairman, Community Development Corporation; Secretary of Housing and Urban Development.

THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
CIRCULAR ON AREAWIDE PLANNING REQUIREMENTS
CIRCULAR MPD 6415.1A 12-14 (July 31, 1970)

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, AREAWIDE PLANNING REQUIREMENTS

HUD

Circular MPD 6415.1A, 12-14 (July 31, 1970)

The Comprehensive Planning Process. It is essential that a continuing comprehensive planning process be developed and maintained. Such a process involves human and natural resources, as well as economic, governmental and physical concerns related to the development and well being of the APJ.[21] Planning should be comprehensive in the sense that it encompasses elements for housing, employment, and other aspects necessary to address current and future problems of land use and development. Procedural matters should be so structured as to allow minority and low-income groups to significantly impact the decision-making process. Further, through comprehensive planning, programs should be effectuated to create areawide choices to house minority and low-income families. Additional programs should be structured as necessary to address problems of and interrelationships between educational facilities, employment centers, transportation, taxation, intergovernmental relations, etc., as they relate to housing and development. Basic components to be considered in the planning process are set forth below.

(1) *Development of goals and objectives* to provide a framework for planning and policy decisions, to relate functional elements to one another, and to relate the technical phases of the planning process to overall policy making. Goals are long term in nature, requiring periodic updating and modification as realistic alternatives for meeting such aspirations emerge. Objectives should be set forth in measurable terms and time periods whenever possible to enable evaluation of progress toward the stated goals.

(2) *Identification of problems and opportunities* as a basis for preparing a program to study and resolve problems and to meet jurisdictional goals.

(3) *Systematic collection and analysis of data* relating to population, economic factors, health, education, welfare services, land uses, transportation, community facilities, government organization and other factors relating to problems and opportunities.

(4) *Development, evaluation and testing of alternative courses of action* to resolve the problems and to meet jurisdictional goals for consideration by the policy makers, affected interests and the public.

(5) *Development of a long-range comprehensive plan* for the future development of the APJ. This may be basically a policies plan setting forth the agreed upon courses of action from item (4). The goals and objectives (item (1)) should be refined and adopted as a component of the plan. The plan should provide a coordinative framework for functional planning with future needs and objectives expressed for the various functional areas based on such indices as population and employment characteristics, distribution and future estimates. . . .

[21] Areawide Planning Jurisdiction, which "shall include a municipality . . . plus the surrounding areas which form an economic and socially related region, taking into consideration such factors as present and future (minimum 20 years) population distribution and patterns of urban growth, location of transportation . . . and distribution of industrial, commercial, residential, governmental and other activities." Circular MPD 6415.1A at 4. — Ed.

(6) *Development of legislative, regulatory and administrative measures* to implement the comprehensive plan, including short-term action programs, fiscal plans and programming of capital investments and services together with budgetary measures.

(7) *Updating and refining* in response to new agreements on goals and policies, current data and conditions, new methods and techniques and generally new concepts and ideas about the future.

(8) *Development and maintenance of systems* to enable a continuing *evaluation* of the planning process and the measurement of the results of policy, objectives, program recommendations and implementation efforts.

SHARP, OXFORD REPLANNED
213-215 (1948)

1. The character of Oxford is a matter of national as well as local concern. The future of the city must be settled in the light of its place in the national economy, and not merely out of a consideration of the internal needs of Oxford alone or out of the desires of the majority of its inhabitants.

2. In the interest both of the city's social well-being and of its historical character, the great Nuffield and the Pressed Steel works should be removed from the city to some other part of the country.

3. New factories, of the right kind, in the right proportion, and in comparatively small units, will need to be brought into the city to employ those workers who do not migrate with the migrating works.

4. The city should at the most grow no bigger than its present population of 100,000 and should preferably decline in size to a population of 90,000 or slightly less.

5. The prime function of the future city should be as a university city and a county and regional capital; but though manufacturing should not be a prime function, there should nevertheless be sufficient well-balanced and well-diversified industry to assure its social health and material well-being.

6. New territorial growth should be by way of consolidation within the present urbanized area rather than any extensive building over of new land.

7. There should be no further building, except for rural purposes, in the country-side immediately around the city.

8. If the building of satellites to Oxford becomes necessary, they should be established at least ten miles away. . . .

11. A middle ring road should be developed to take cross-town traffic.

12. New inner city roads . . . should be built . . . .

13. No bus services should run on High Street, Queen Street, Cornmarket Street, or the upper part of St. Aldate's, excepting a "shuttle service" along High Street between the Plain and the Stations. Vehicles of over 2 tons should be banned from these streets, and there should be a maximum speed limit of 20 miles per hour upon them.

14. The present railway stations should be rebuilt as one, with a new bus station alongside, the whole constituting a main transport station. . . .

16. All flying immediately over the city should be banned. . . .

18. Since the absence of any knowledge of the plans and intentions of the University is a serious obstacle to the proper planning of the city as a whole, the

SUPREME COURT, U. S.

FILED

MAY 19 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1310

EDWARDS UNDERGROUND WATER DISTRICT; BEXAR COUNTY, TEXAS; CITIZENS FOR A BETTER ENVIRONMENT; and LEAGUE OF WOMEN VOTERS,

Petitioners,

v.

CARLA A. HILLS (JAMES T. LYNN), SECRETARY OF THE U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; and SAN ANTONIO RANCH, LTD.,

Respondents.

BRIEF OF RESPONDENT, SAN ANTONIO RANCH, LTD., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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EDWARDS UNDERGROUND WATER DISTRICT; BEXAR COUNTY, TEXAS; CITIZENS FOR A BETTER ENVIRONMENT; and LEAGUE OF WOMEN VOTERS,

Petitioners,

v.

CARLA A. HILLS (JAMES T. LYNN), SECRETARY OF THE U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; and SAN ANTONIO RANCH, LTD.,

Respondents.

BRIEF OF RESPONDENT, SAN ANTONIO RANCH, LTD., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, San Antonio Ranch, Ltd. (the "developer"), respectfully prays the Court to deny the Petitioners' Petition For Writ of Certiorari to the United States Court Of Appeals For The Fifth Circuit.

Questions Presented For Review

1. Whether HUD included in its recommendation on the proposed Federal action a detailed statement (Environmental Impact Statement or "EIS") on alternatives to the proposed action.

2. Whether the responsible Federal official made the Environmental Impact Statement that is a part of the record of this cause.

3. Whether HUD included in its recommendation on the proposed Federal action a detailed statement on the environmental impact of the proposed action.

4. Whether HUD's Environmental Impact Statement was made by the responsible Federal official prior to the making of the decision to take Federal action.

5. Whether HUD's action complied with the provisions and terms of the Urban Growth and New Community Development Act of 1970.

Reasons For Denying The Writ

I. The Court of Appeals did not render a decision in conflict with the decision of any other court of appeals on the same matter.

II. The Court of Appeals' decision is clearly correct.

III. The Court of Appeals has not decided an important question of federal law which has not been, but should be, settled by this Court.

ARGUMENT

I.

The Court Of Appeals Did Not Render A Decision In Conflict With The Decision Of Any Other Court Of Appeals On The Same Matter.

A. The Decision On The Statement On Alternatives To The Proposed Action.

A rule which several courts of appeals have applied to determine if the responsible Federal official made a detailed statement on alternatives to the proposed action is that the agency recommending a proposed action "must—to the *fullest* extent possible under its other statutory obligations —consider alternatives to its action which would reduce environmental damage." *Calvert Cliffs' Coordinating Committee* v. *AEC*, 449 F. 2d 1109, 1128 (D.C. Cir. 1971), cert.

denied, 404 U.S. 942 (1972); accord, *Iowa Citizens For Environmental Quality, Inc.* v. *Volpe*, 487 F. 2d 849, 851-852 (8th Cir. 1973). This Court of Appeals applied the same rule to HUD's EIS and concluded that such EIS, tested by the "rule of reason", satisfied NEPA's requirements. 502 F. 2d at 61-62. Any distinction between this conclusion and the conclusion of any other court, including those cited by Petitioners (Pet. for Cert., at 13-22), would be and is based on the application of a rule to different fact situations. Not having established a rule that "something less than compliance 'to the fullest extent possible' is acceptable", however, the Court obviously did not decide to establish a rule that conflicts with a rule established by another court of appeals.

B. The Decision On Whether The Environmental Impact Statement Was Made By The Responsible Federal Official.

NEPA imposes upon the "responsible official", Section 102(2)(c), the duty to make the EIS. In *Greene County Planning Board* v. *FPC*, 455 F. 2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972), the Court described the action taken by the FPC pursuant to NEPA:

> Section 281(b) of the [FPC's] regulations [designed to implement procedures in accord with NEPA] required each applicant for a license for a 'major project' to file its own detailed statement of environmental impact developing fully the five factors listed in Section 102(2)(c) of NEPA. . . . The Commission reviewed the [applicant's] statement as to sufficiency of form . . . and then circulated it for comment. . . . *Id.* at 416-417.

In accordance with Section 102(2)(c), that court decided the rule is that "(t)he primary and nondelegable respon-

sibility for [considering environmental values at every distinctive and comprehensive stage of the agency's process] lies with the [agency]. *Calvert Cliffs' Coordinating Committee, Inc.* v. *United States Atomic Energy Commission*, 449 F. 2d 1109, 1119 (D.C. Cir. 1971)." *Id.* at 420. Applying, then, that rule to the facts, that Court concluded that "(t)he Federal Power Commission . . . abdicated a significant part of its responsibility by substituting the statement of [the applicant] for its own." *Id.* at 420. This Court of Appeals certainly did not decide to establish any rule that conflicted with the *Greene County* rule. 502 F. 2d at 59. Rather, it followed that rule: "NEPA's commands . . . do not permit the responsible federal agency to abdicate its statutory duties by reflexively rubber stamping a statement prepared by others. The agency must independently perform its reviewing, analytical and judgmental functions and participate actively and significantly in the preparation and drafting process. See *Green County Planning Board* v. *F.P.C.*, 455 F. 2d 412 (2d Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L.Ed. 2d 90 (1972)." *Id.* In applying that rule to a different fact situation, however, this Court of Appeals concluded that HUD did not abdicate its responsibility as did the FPC. *Id.*

C. The Decision On Whether HUD Included In Its Recommendation On The Proposed Federal Action A Detailed Statement On The Environmental Impact Of The Proposed Action.

Section 102(2)(c)(i) imposes upon the responsible official the duty to make a detailed statement on the environmental impact of the proposed action. The Court of Appeals in *Silva* v. *Lynn*, 482 F. 2d 1282 (1st. Cir. 1973), impliedly decided that the statement on the environmental impact of the proposed action must include a statement on both "primary" and "secondary" impacts. *Id.* at 1286.

This implied decision would be in accord with some guidelines for preparing Environmental Impact Statements: CEQ Guidelines, 36 Fed. Reg. 7725 (April 23, 1971); 40 C.F.R. § 1500.8(a)(3)(iii). This Court of Appeals did not decide otherwise. Instead it impliedly rendered a similar decision. 502 F. 2d at 60-61. Upon application of the same rule that was impliedly recognized in *Silva* v. *Lynn, supra*, however, this Court of Appeals made a conclusion, based upon a different fact situation, that HUD's EIS satisfied the duty imposed by section 102(2)(c)(i). 502 F. 2d at 60-61.

D. The Decision On Whether HUD's EIS Was Made Prior To The Making Of The Decision To Take Federal Action.

This Court of Appeals did not decide to establish a rule that HUD, or any other federal agency, could make a decision to take federal action and then make an EIS in which it could give merely *pro forma* consideration to environmental factors or in which it could make a *post hoc* rationalization of such decision. Instead, this Court of Appeals recognized the principle, based on section 102(c)'s provision that the EIS "shall accompany the proposal through the existing agency review processes", that the EIS must be made at a meaningful time in the decision-making process. 502 F. 2d at 59-60. Thus this Court of Appeals undoubtedly rendered no decision that is in conflict with any other Court of Appeals decision that an EIS must not be merely a *pro forma* statement or a *post hoc* rationalization of the agency's decision to take action. Again this Court of Appeals has decided to follow and apply the same principles and rules that other Courts of Appeals have decided to establish or follow, but, upon application of such principles and rules to different situations, has concluded that HUD's EIS was timely made.

II.

The Court Of Appeals Decision Is Clearly Correct.

A. The NEPA Issues.

The purposes to be served by an EIS are to enable those who did not have a part in its making to understand and consider meaningfully the factors involved, *Trout Unlimited* v. *Morton*, 509 F. 2d 1276, 1282 (9th Cir. 1974); *Silva* v. *Lynn*, *supra*, 482 F. 2d at 1284-1285; *Environmental Defense Fund* v. *Corps of Engineers*, 470 F. 2d 289 (8th Cir. 1972), and to compel the decision maker to give serious weight to environmental factors in making discretionary choices, *Silva* v. *Lynn*, *supra*, 482 F. 2d at 1284-1285; *Monroe County Conservation Council, Inc.* v. *Volpe*, 472 F. 2d 693 (2d Cir. 1972); *Committee For Nuclear Responsibility* v. *Seaborg*, 463 F. 2d 783 (D.C. Cir. 1971); *National Helium Corp.* v. *Morton*, 455 F. 2d 650, 656 (10th Cir. 1971); *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, *supra*, 449 F. 2d at 1114. Section 102(2)(c) contains the procedural requirements designed to compel all federal agencies contemplating taking action having a significant impact on the environment to consider NEPA's policies and goals as enunciated in Section 101. The federal agency must comply with the duties imposed upon it by section 102(2)(c) "to the fullest extent possible", *Iowa Citizens For Environmental Quality, Inc.* v. *Volpe*, *supra*, 487 F. 2d at 851; *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, *supra*, 449 F. 2d at 1114-1115. A court's decision, however, as to whether the federal agency has complied with section 102(2)(c) is governed by a "rule of reason", i.e., the reviewing court must recognize, as did this Court of Appeals, on the one hand that NEPA mandates that no agency limit its environmental activity by the

use of an artificial framework and on the other that the Act does not intend to impose an impossible standard on the agency. *Carolina Environmental Study Group* v. *AEC*, 510 F. 2d 796 (D.C. Cir. 1975); *Trout Unlimited* v. *Morton, supra*, 509 F. 2d 1276; *Lathan* v. *Brinegar*, 506 F. 2d 677 (9th Cir. 1974). Furthermore, the courts have understood that Congress did not intend to mandate perfection. See, e.g., *EDF* v. *Corps of Engineers*, 342 F. Supp. 1211, 1217, *aff'd*, 472 F. 2d 289 (8th Cir. 1972).

Since HUD's EIS clearly enabled those who did not participate in making it to understand and consider meaningfully the factors involved and compelled the decision maker to give serious weight to environmental factors in making the decision, upon application of the "rule of reason" HUD's EIS clearly satisfies at least the minimum requirements of section 102(2)(c).

B. The New Community Act Issues.

The Court of Appeals concluded that the District Court's findings of facts on these issues, 364 F. Supp. at 839, were not clearly erroneous. 502 F. 2d at 55. Based upon these findings the District Court concluded, as did the Court of Appeals, 502 F. 2d at 57, that HUD did not act arbitrarily or capriciously, and did not fail to act in accordance with law, when it decided to assist the developer pursuant to the Act. *Id.* The petitioners' attack on the lower court's findings of facts has been conclusively resolved against it by the Court of Appeals.

The Petitioner's assertion that the developer's proposed project may inflict destruction upon the standard of living for Bexar County's one million people (Pet. for Cert., at 29), is a dramatic statement, designed to excite and scare, which has not been found by either of the lower court's to have any evidentiary support.

Both of the lower court's opinions deserve careful reading. A comparison of those opinions with the Petition for Certiorari will without any effort on the developer's part, persuade this Court that Petitioners' are not arguing any legal point but are merely, as previously stated, rearguing evidentiary points which were not persuasive to the courts below and should not have any effect on the issue of whether this Court should review the cause. The Court of Appeals' statement is conclusive:

> Not only did both HUD and the developer endeavor to work closely and cooperate fully with state, local and city officials, the record also shows that the Ranch project "is consistent with comprehensive planning . . . determined by the Secretary to provide an adequate basis for evaluating the new community development program in relation to other [state, local and private] plans and activities . . . ," 42 U.S.C. § 4513(a)(4), and "has received all governmental reviews and approvals required by State or local law, or by the Secretary," 42 U.S.C. § 4513 (a)(5).

Petitioners seek to extract bits and pieces of evidence from the voluminous record below and draw their own conclusions from such isolated evidence (Pet. for Cert., at 31-35). As to each bit of extracted evidence it must be noted that there were scientific studies and technical studies conducted by geologists, hydrologists, microbiologists, urban experts, CPA's and a host of other well-qualified experts who conducted studies in each area of consideration involved and the substantial evidence supported HUD's favorable findings. The Court of Appeals reviewed these efforts by HUD and stated, at 55-56:

Urging that HUD made no studies of the Ranch's impact on San Antonio urban problems (transportation facilities, minority and low income distribution, inner city tax base, balanced growth or revitalization of the central city), plaintiffs argue that the Ranch cannot be consistent with comprehensive planning for the entire urban area, as required by section 4513(a)(4) and HUD regulations (since no such plan exists), and that Bexar County, which must become responsible for governing and servicing the development, was never asked to approve the Ranch, as mandated by section 4513(a)(5).

The administrative record demonstrates that from the beginning HUD conceived of the Ranch as an integral element of the entire San Antonio community. The myriad economic, marketing, environmental and urban studies indicated that the project would provide a viable alternative (preserving and enhancing the existing natural amenities) to the rapid and disorderly urban growth projected for the northwest quadrant of Bexar County, an area devoid of governmental land use regulations or comprehensive water resource management planning. It is anticipated that this growth phenomenon will be exacerbated by the nearby construction of the University of Texas at San Antonio and the South Texas Medical Center. Thus, the orderly development of the Ranch should advance the goals of Title VII by retarding the expected and otherwise inevitable urban sprawl over the aquifer through implementation of a comprehensive land use plan which institutes demanding environmental controls in an ecologically sensitive area as well as by contributing to the welfare of the entire San Antonio community.

HUD evaluated the project's feasibility and its interrelation with the City of San Antonio by examining regional growth trends, population and employment distribution, market potentials, adequacy of regional transportation facilities and the long-term fiscal and economic impact of the Ranch on its adjacent political jurisdictions. These areas of concern were treated in the August 1971 report of the Assistant Secretary of HUD to the Community Development Board of Directors. He examined and the Board approved the Ranch with respect to each requirement of section 4513 and all applicable HUD regulations. To allay fears that the Ranch would counteract efforts to revitalize the downtown area of San Antonio, the developer submitted expert studies to the City Council that indicated a minimally harmful, if not an overall beneficial, economic impact on the city and its tax base from the project. As a result the City Council rescinded its prior unfavorable position as to the Ranch and in February of 1972 voted to adopt a resolution supporting annexation of the Ranch in the future and to execute an agreement of cooperation with the developer: (a) to institute measures to protect the Edwards reservoir from pollution, (b) to channel all urban-type federal grants through the City, (c) to seek assistance from the developers with planning, analysis and feasibility studies for a possible Title VII new-town-in-town project in San Antonio, and (d) to provide water, gas, electricity, sewerage and other municipal services to the Ranch under contract with the developer. In responding to comments to the "final" environmental impact statement, HUD stated that it would give full consideration to a new-town-in-town com-

munity in San Antonio regardless of the final action it took as to the Ranch.

The Court of Appeals stated further, at 57:

> The record before us does not support the claim that HUD failed to consider all relevant Title VII factors in reaching its decision or that the decision itself manifests a clear error in judgment. The legislative history of Title VII and HUD regulations thereunder clearly contemplate federal assistance for "free standing and self-sufficient new communities away from existing urban centers where there is a clear showing of economic feasibility, primarily . . . to accommodate [expected] population growth," as well as for new communities in metropolitan areas that are designed to combat urban sprawl and to renew deteriorating central cities. *See* proposed HUD Reg. § 32.7(a), 36 Fed. Reg. 14207 (1971). We hold that Secretary Lynn acted neither arbitrarily nor capriciously, nor failed to act in accordance with law when he determined to grant the developers of the Ranch federal assistance under the Urban Growth and New Community Development Act.

Petitioners next seek to assert that the Court of Appeals erred in finding that the Alamo Area Council of Government had conducted an ongoing comprehensive plan at HUD's behest, and, because the Court erroneously so found, that the project does not comply with HUD's regulations which require that the project comply with comprehensive area-wide plans. (Pet. for Cert., at 33-34).

This Court need only refer to the Court of Appeals' opinion for a detailed reply to this argument wherein Judge

Clark correctly wrote on the comprehensive planning issue, and applied the proper law. As Judge Clark stated, at page 57:

> Title VII does not state that the existence of a comprehensive regional land use is a condition precedent to federal assistance or that if no such plan is in effect, the Secretary must exercise his statutory authority to make comprehensive planning grants available to official governmental planning agencies where rapid urbanization is expected to occur on property to be developed as a new community, *see* 40 U.S.C. § 461. In this vein, draft HUD regulations provide that "the area within which a new community is to be situated must be covered by a comprehensive areawide plan *or by ongoing planning promulgated or carried on by a duly authorized agency.*" Proposed HUD Reg. § 32.7(f), 36 Fed. Reg. 14208 (1971) (emphasis added). These regulations also state that the comprehensive planning for the area must, in the secretary's judgment, be sufficiently detailed to provide a reasonable basis for evaluating the relationship of the proposed new community to other state, local and private plans and activities and that in those areas with a regional planning agency certified by the secretary, consistency must be found between the new community and the planning conducted by such agencies.
>
> Plaintiffs do not assert that the Alamo Area Council was improperly certified by HUD or defaulted in its A-95 and regional planning responsibilities. There is no evidence that the council (among whose 16 members were representatives from plaintiff-intervenors, Edwards Underground Water Dis-

trict and Bexar County) inadequately discharged its planning and reviewing functions or erroneously determined that the Ranch was a viable project. Its conclusions were independently corroborated by various other local governmental agencies and were approved by the district court. Finally, that no official endorsement of the Ranch by Bexar County is required by state law is verified by a letter to HUD approving the Ranch from Bexar County Commissioners Court Judge Blair Reeves, who stated that though the county had no planning or zoning responsibility under existing state law, he found the project to be consistent with the San Antonio metropolitan area goals. This point was mooted in April of 1974 when the City Council of San Antonio voted to extend the city's extra-territorial jurisdiction over the Ranch from 58% to 100% of the proposed site.

Therefore, the petitioner's position on this point is exceptionally weak, and, as Judge Clark stated, Bexar County, one of the petitioners herein, had through its County Judge, written a letter to HUD stating that as County Judge, he found the project to be consistent with the San Antonio Metropolitan Area goals.

Finally, Petitioners complain about the Court of Appeals' decision that neither the "national urban growth policy", 42 U.S.C. § 4502(d), nor the description of the results of continuation of established patterns of urban development, 42 U.S.C. § 4511(b), created any judicially enforceable rights. While this decision is manifestly correct, it is not material to the judgment because the Court of Appeals did not find that HUD absolutely failed "to adhere to the Congressional purposes and intents expressed in the Act" (Pet. for Cert., at 35), or that the action HUD

took "under authority of [the Act] is contrary to the purposes and goals of that authorizing Act". (Pet. for Cert., at 36). *Shannon* v. *HUD*, 436 F. 2d 809 (3d Cir. 1970), is clearly distinguishable from the present case because in it that Court found that the Federal agency's decision was made without consideration of relevant factors and concluded that the agency's decision violated rights conferred upon persons by the Civil Rights Acts.

III.

The Court Of Appeals Has Not Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The second "reason" Petitioners give for this Court to review the cause is that "HUD's commitment to the Developer violates the New Community Act." (Pet. for Cert., at 28). This statement is merely a point that the Court of Appeals erroneously affirmed the District Court's judgment but is not a statement of an appropriate reason why this Court should review the cause. The Petitioners also state "(b)ecause of its magnitude and the potential destruction that the proposed project may inflict upon the standard of living for Bexar County's one million people . . . a Writ of Certiorari should issue. . . . (Pet. for Cert., at 29). This reasoning is also completely unrelated to the appropriate reasons for this Court to review a cause. The mere statement that "the New Community Act has not yet received any interpretation by this or any other appellate court except the court below" does not even pretend to state why the Court of Appeals decided an important question of federal law that should be decided by this Court. Further reply in opposition to the petition seems very unnecessary.

CONCLUSION

For the reasons stated herein, Respondent San Antonio Ranch, Ltd., respectfully prays the Court to deny the Petition For Writ of Certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–1310

EDWARDS UNDERGROUND WATER DISTRICT, ET AL., PETITIONERS

v.

CARLA A. HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET. AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A46 [1]) is reported at 502 F. 2d 43. The opinion of the district court (Pet. App. A48–A89) is reported at 364 F. Supp. 834.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1974. A timely petition for rehearing

[1] "Pet." refers to the petition for a writ of certiorari. "Tr." refers to the transcript of the proceeding in the district court.

was denied on November 19, 1974 (Pet. App. A47). Mr. Justice Powell, by order dated February 5, 1975, extended the time for filing a petition for a writ of certiorari to April 18, 1975. The petition was filed on that date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Secretary of Housing and Urban Development complied with the National Environmental Policy Act of 1969, Pub. L. 91–190, 83 Stat. 852–854, 42 U.S.C. 4321–4335.

2. Whether the court of appeals correctly held that the decision of the Secretary of Housing and Urban Development to afford financial assistance to a proposed development pursuant to the Urban Growth and New Community Development Act of 1970, Pub. L. 91–609, 84 Stat. 1791–1804, 42 U.S.C. 4501–4532, was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" within the meaning of the Administrative Procedure Act, 5 U.S.C. 706(2)(A).

STATUTES AND REGULATIONS INVOLVED

The relevant statutes, regulations and proposed regulations are set forth in the appendix to the petition for a writ of certiorari.

STATEMENT

In November 1970, San Antonio Ranch, Ltd. ("Developer") submitted a formal application to the Office of New Community Development, Department of

Housing and Urban Development ("HUD"),[2] for a HUD financing guarantee under Title VII of the Urban Growth and New Community Development Act of 1970, Pub. L. 91-609, 84 Stat. 1791-1804, 42 U.S.C. 4501-4532, to develop San Antonio Ranch New Town ("New Town") (Pet. App. A12; Tr. 1522). The Developer planned to construct the New Town on what was then predominantly virgin Texas hill country in the northwest quadrant of Bexar County, Texas, near the town of San Antonio, the South Texas Medical Center, the University of Texas at San Antonio, and the San Antonio International Airport (Pet. App. A9-A10).

A citizens group expressed concern to HUD about the possible damage the development might cause to the Edwards Aquifer, an underground reservoir that constitutes the water supply for the City of San Antonio and its environs, due to the fact that approximately 0.5% of the aquifer's annual water source originates from the site of the proposed New Town (Pet. App. A64).[3]

[2] Pursuant to the Urban Growth and New Community Development Act, 42 U.S.C. 4501-4532, the Secretary of HUD is authorized to guarantee and enter into commitments to guarantee the obligations of private entities that desire to establish and implement new community development programs. 42 U.S.C. 4514. The functions of the Secretary with respect to the Act are administered through the Community Development Corporation, which is established by the Act within HUD. 42 U.S.C. 4532.

[3] The water in the aquifer comes from three major sources: streams which flow across fractures and joints in rocks; underflow from another area of the underground reservoir; and, less importantly, rainfall (Pet. App. A11-A12). The New Town site is not located upon any major point at which water seeps down to the reservoir (Pet. App. A64).

As a result of this concern, HUD asked the Developer to retain a geologist-hydrologist to examine the project (Pet. App. A12). In addition, HUD obtained the comments of the Alamo Area Council of Governments, a regional multi-governmental planning organization composed of 16 representatives of the Edwards Water District, Bexar County and the 11 surrounding counties, which had conducted a review of the project (Pet. App. A12–A13). Additional comments were obtained from the Texas Water Quality Board and from San Antonio city officials (Pet. App. A13). Finally, an interdisciplinary team of HUD New Community Development staff members prepared a draft environmental impact statement (*ibid.*).

In September 1971, HUD circulated its draft Environmental Impact Statement ("EIS") for comment (Pet. App. A13). Approximately one month later, after considering a report on the project from the Assistant HUD Secretary for Community Planning Development, the Board of Directors of HUD's Community Development Corporation voted to authorize the Assistant Secretary to make an offer of commitment to guarantee the obligations of the Developer (Pet. App. A29).

On January 20, 1972, HUD issued its "final EIS" on the project, incorporating the written comments of 7 of 13 public agencies whose views had been solicited, and comments volunteered by 9 other agencies or groups (Pet. App. A13).

Accordingly, on February 23, 1972, HUD transmitted an offer of commitment to the Developer, proposing a federal loan guarantee of up to $18 mil-

lion, contingent upon the Developer's agreement, *inter alia*, to a number of conditions concerning protection of the aquifer (Pet. App. A13–A14).[4] On the same date, the petitioners filed their complaint seeking a temporary restraining order and declaratory and injunctive relief prohibiting respondents from issuing or accepting either the bond guarantee or any other federal assistance supporting development of the New Town until the Developer had satisfied the conditions in the offer of commitment and executed a project agreement with HUD[5] (Pet. App. A14).

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[4] These conditions were summarized by the court of appeals as follows (Pet. App. A13–A14): "(1) a moratorium prohibiting development over the recharge zone of the aquifer until completion of a comprehensive environmental study of the recharge zone by the developer and until approval by the HUD Community Development Board and the Texas Water Quality Board of the measures proposed to protect the natural conditions disclosed by the study, (2) review and comment thereon by a public and interagency board organized to the satisfaction of HUD, and (3) the adoption of treatment methods and other continuing measures such as the monitoring of water quality, required by the Community Development Board and the Texas Water Quality Board."

[5] The suit was originally instituted by four citizens' groups, the Sierra Club, Citizens for a Better Environment, League of Women Voters of the San Antonio Area, and American Association of University Women, San Antonio Branch (Pet. App. A9). The Texas Water Quality Board later was permitted to intervene on behalf of the respondents, and the Edwards Underground Water District, together with Bexar County, was permitted to intervene on behalf of the petitioners (*ibid.*).

The Edwards Underground Water District amended its complaint to allege a violation of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. (Supp. III) 1251 *et seq.* (*ibid.*), but both courts below rejected that contention. Petitioners do not raise this point here.

The district court denied petitioners' motion for a temporary restraining order and granted respondents' motion to hold the case in abeyance until the Developer had complied with the conditions contained in the offer of commitment and executed a project agreement with HUD (Pet. App. A14). Thereafter, in accord with the conditions contained in the offer of commitment, HUD established the San Antonio Water Quality Advisory Review Board, composed of 18 public agencies and Bexar County, to review the impact of the project on the aquifer (*ibid.*). After four public meetings, and a detailed review of all relevant material, the Board approved the project (*ibid.*).

In addition, HUD retained a team of independent geologists who reviewed all aspects of the project and made recommendations for improving environmental controls over the aquifer (Pet. App. A14–A15). The project was again approved by the Texas Water Quality Board (Pet. App. A60), and by the Alamo Area Council of Governments, the San Antonio City Council, Water and Public Service Boards, the State Governor's office and the State Department of Health (Pet. App. A15). Finally, on August 24, 1972, HUD circulated the final EIS and an addendum to 38 public agencies and groups for additional study or comment [6] (*ibid.*).

In October 1972, based on these comments, reports, and recommendations, HUD concluded that the Developer had complied with the conditions of the offer of commitment. Accordingly, HUD proceeded to com-

[6] Attached to the EIS were two appendices consisting of 67 exhibits (Pet. App. A62).

mence negotiations leading to a project agreement (Pet. App. A15). The Developer agreed to a number of additional conditions[7] designed to minimize the impact of the New Town upon the aquifer (Pet. App. A21, A64–A66).[8]

The case proceeded to trial on April 30, 1973. After 9 days of hearings, the district court denied the relief requested by the petitioners and entered judgment for the respondents (Pet. App. A15).

The court of appeals affirmed.[9] The court reasoned that HUD had complied with all procedural and substantive requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321–4335 ("NEPA")

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[7] Pursuant to the administration of the Urban Growth and New Community Development Act, *supra*, a trust indenture and development plan are required (Pet. App. A20). These documents are incorporated in the project agreement and are enforceable at law (*ibid.*).

[8] These duties include, *inter alia*, an extensive street sweeping program, the use of a specified minimum level of top soil on all lawns, the use of only a specified type of fertilizer, the use of double tanks for storage of petroleum products, and the use of specialized sewer pipes and an intensive sewer pipe inspection and water monitoring system (Pet. App. A64–A66).

In addition, the plan specified that "[t]he developer shall comply with such further reasonable standards for environmental quality control as the Secretary may prescribe after consultation with other federal agencies pursuant to the National Environmental Policy Act of 1969"; that the Developer must maintain environmental quality control for such additional period of time after completion of development as the Secretary determines to be appropriate; and that HUD will prepare draft and final environmental statements with respect to any subsequent major actions connected with the project (Pet. App. A21).

[9] In two respects, not relevant here, the court of appeals reversed the decision of the district court (Pet. App. A40–A46).

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(Pet. App. A29–A38). The court noted that HUD's EIS was not a *pro forma* document, that HUD had actually considered the environmental impact of the project prior to making a commitment, and that HUD had permitted a sufficient period of time to lapse between the circulation of the EIS for comments and the decision to make an offer of commitment (Pet. App. A29–A30, A32–A33). The court also ruled that, notwithstanding participation by the Developer in preparation of the EIS, the record adequately supported the district court's conclusion that HUD had actively and independently drafted the statement (Pet. App. A30–A32), and that the EIS adequately considered both the environmental impact of expected "parasite" developments surrounding the New Town and possible alternatives to the project which might have a lesser impact on the environment (Pet. App. A33–A38).

The court also held that the district court's finding that the New Town satisfied all the conditions for a federal government financing guarantee under the Urban Growth and New Community Development Act, 42 U.S.C. 4501–4532 was not clearly erroneous [10] (Pet. App. A22–A23). The court affirmed the district

[10] The findings were (Pet. App. A23):

"(1) The project will provide an alternative to disorderly urban growth;

"(2) It will be economically feasible, in that it will capture more than 15% of the projected growth of Bexar County, because of its wide range of housing amenities and the superior environment;

"(3) It will contribute to the welfare of the entire area, as existing septic tanks will be replaced with storm and sanitary sewers, and as industrial and commercial facilities will be

court's conclusion that, considered as a whole, HUD's decision to provide such a guarantee was not arbitrary, capricious or unlawful (Pet. App. A23–A27).

ARGUMENT

1. a. Petitioners contend (Pet. 13–22) that the EIS failed to consider whether there were alternative sites for the New Town that were located away from the aquifer. The requirement in NEPA (42 U.S.C. 4332 (2) (C)(iii) and (D)) that an agency study and develop alternatives, however, must be "judged against a rule of reason" (Pet App. A36). See *Life of the Land* v. *Brinegar*, 485 F. 2d 460, 472 (C.A.9), certiorari denied 416 U.S. 961; *National Resources Defense Council, Inc.* v. *Morton*, 458 F. 2d 827 (C.A. D.C.). The EIS in the instant case did consider the possibility of locating the New Town away from the aquifer (Pet. App. A97–A98).

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placed in a setting encompassing a broad price range of housing;

"(4) It is consistent with comprehensive physical and social planning;

"(5) It has received all governmental reviews and approvals required by State or local law;

"(6) It will contribute to desirable living conditions in the community, and will be characterized by well balanced and diversified land use patterns, and will include or be served by adequate public, community, and commercial facilities;

"(7) It makes substantial provision for housing within the means of persons of low and moderate income;

"(8) It will make significant use of advances in design and technology with respect to land utilization, materials and methods of construction, and the provision of community facilities and services; and

"(9) A basis of financial, technical, and administrative ability which demonstrates capacity to carry out the program with reasonable assurance of its completion has been shown. *Sierra Club* v. *Lynn*, *supra*, 364 F. Supp. at 839."

That possibility was rejected, however, since approval of a plan at an alternative site would permit haphazard development over the aquifer without benefit of the stringent controls that HUD would impose upon the Developer (see n. 8, *supra*, at 7) and without serving the needs of residents of the northwest quadrant of Bexar County (Pet. App. A54, A98).[11]

HUD was not compelled to consider the possibility that it might finance the building of a new town at an alternative site, since such a project could be undertaken only on lands owned by the federal government utilizing funds made available specifically for the project by Congress, 42 U.S.C. 4524, and upon specific authorization of the President. NEPA does not require an agency to consider alternatives that are remote and speculative. See *Life of the Land* v. *Brinegar, supra; National Resources Defense Council, Inc.* v. *Morton, supra.*[12]

b. Petitioners next contend (Pet. 23–25) that the EIS was deficient because the Developer participated in its preparation. NEPA does not, however, prohibit

[11] The court below held that none of the alternative sites in Bexar County suggested by petitioners met the requirements of the Urban Growth and New Community Development Act (Pet. App. A37).

[12] The decision below as to the adequacy of the consideration of alternatives is not in conflict with *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 608 (C.A. 2), certiorari denied, 384 U.S. 941, as petitioners contend (Pet. 17–18). In that case, there was "no doubt" but that the Commission, as a body designed to regulate public utilities, was under a specific duty pursuant to its organic statute, to "give full consideration to alternative plans." 354 F. 2d at 617. *Cf. Udall* v. *Federal Power Commission*, 387 U.S. 428.

financially interested new community applicants from providing the federal agency with data, information, reports, environmental studies or other assistance in the preparation of an environmental impact statement. See *Iowa Citizens for Environmental Quality, Inc.* v. *Volpe,* 487 F. 2d 849 (C.A. 8); *Citizens Environmental Counsel* v. *Volpe,* 484 F. 2d 870 (C.A. 10), certiorari denied, 416 U.S. 936. NEPA requires only that "the applicable federal agency must bear the responsibility for the ultimate work product designed to satisfy the requirement of section 102(2)(C)." *Life of the Land* v. *Brinegar,* 485 F. 2d 460, 467 (C.A. 9), certiorari denied, 416 U.S. 961. Guidelines promulgated by the Council on Environmental Quality and the Environmental Protection Agency regarding preparation of impact statements contemplate submission of initial environmental information to the agency and permit local and state groups to participate in the statement's preparation (see [redacted], 40 C.F.R. 6.21(c); 40 C.F.R. 1500.7(c))[13] There was no showing in the instant case that HUD had not independently performed its reviewing, analytical and judgmental functions or participated actively and significantly in the drafting process (Pet. App. A60–A63).

c. Petitioners also contend (Pet. 25–26) that the EIS was inadequate because it did not consider the effect of "parasite" developments that the New Town

[13] Although the court in *Conservation Society of Southern Vermont* v. *Secretary of Transportation,* 508 F. 2d 927 (C.A. 2), held that the Federal Highway Administration must prepare the impact statement itself—an issue in regard to which we have sought review in this Court (see our pending petition for a writ of certiorari, *Coleman* v. *Conservation Society of Southern Vermont,*

could be expected to attract around its site. As the court of appeals noted (Pet. App. A34), however, the EIS did in fact recognize that the New Town would tend to attract parasite settlements. The exhibits in the addendum to the EIS disclosed "the expected cumulative impact of the Ranch on population distribution, land use patterns and the financial and economic resources of Bexar County and the surrounding areas" (*ibid.*). As the court of appeals observed, "NEPA does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula" (Pet. App. A34).[14]

d. Petitioners next contend (Pet. 26–28) that HUD violated its own regulations when in October 1971, one month after the draft EIS was issued, the Board of Directors of the Community Development Corpo-

No. 74-1413)—the court recognized that the federal agency nevertheless could "solicit and integrate information from state agencies." 508 F. 2d at 933. There is thus no reason for the Court to hold this case pending disposition of our petition in *Conservation Society*, a copy of which we are serving on counsel for petitioners here. *Greene County Planning Board* v. *Federal Power Commission*, 455 F. 2d 412 (C.A. 2), certiorari denied, 409 U.S. 849, upon which petitioners rely, is a precursor of *Conservation Society* and inapposite for the same reason.

[14] Contrary to petitioners' contention (Pet. 26), the holding of the court of appeals on the question of the "parasite" developments is not in conflict with the decision in *Silva* v. *Lynn*, 482 F. 2d 1282 (C.A. 1), where the court held that the proposed method of solving the drainage problem in areas adjacent to the project was "myopic in the sense of focusing on the project site itself, with no supported judgment" as to what effect the proposed solution would have upon the adjacent areas (482 F. 2d at 1286). As we have noted, however, the EIS in the instant case fully considered the effect of the plan upon adjacent areas.

ration voted to authorize the Assistant Secretary for Community Planning Development to make an offer of commitment to the Developer "at the earliest appropriate time" (Pet. App. A29), and when it extended an offer of commitment on February 23, 1972, contingent upon an "environmental clearance."[15]

As the court of appeals concluded after examining the entire record, however, "[n]on-degradation of the aquifer and ranch environment were paramount considerations throughout the entire HUD review of the Ranch [New Town] application" (Pet. App. A31). Moreover, the offer of commitment was authorized by both the Urban Growth and New Community Development Act (42 U.S.C. 4513, 4514), and by the draft regulations for the implementation of that Act (36 Fed. Reg. 14212–14213 (1971)). Accordingly, neither the October 1971 vote by the Board of Directors of the Community Development Corporation nor the February 1972 contingent extension of an offer of commitment short-circuited the review procedure. Had an environmental clearance not been forthcoming, the offer would have been revoked.

2. Petitioners finally contend (Pet. 28–36) that HUD's commitment to the Developer violates the Urban Growth and New Community Development Act because the New Town does not meet the eligibility requirements contained in that Act and does not promote the goals of that Act. As the court of appeals correctly held, however, the goals enumerated in the

[15] For the conditions contained in the offer of commitment, see n. 4, *supra*. Petitioners contend that environmental clearances should be part of the review process (Pet. 27–28).

Act do not confer judicially enforceable rights. Nor was the district court's finding that the New Town met the eligibility requirements in the Act clearly erroneous.

The legislative history of the Act and HUD regulations thereunder clearly contemplated federal assistance for "[f]ree standing and self-sufficient new communities away from existing urban centers where there is a clear showing of economic feasibility, primarily * * * to accommodate [expected] population growth." See proposed HUD Reg. 32.7(a)(4), 36 Fed. Reg. 14207 (1971). As the court of appeals noted (Pet. App. A24–25), the record demonstrates that HUD conceived of the New Town as an integral element of the entire San Antonio community, providing a viable alternative to disorderly and rapid urban growth in that area. Orderly development would advance the goals of the Act by retarding urban sprawl over the aquifer through implementation of a comprehensive land use plan. The Act does not require the existence of a comprehensive regional land use plan as a condition precedent to federal assistance. See 40 U.S.C. 461. HUD regulations provide only that "[t]he area within which a new community is to be situated must be covered by * * * ongoing planning promulgated or carried on by a duly authorized agency" (see proposed HUD Reg. 32.7(f)(1), 36 Fed. Reg. 14208 (1971)), as occurred in the instant case.[16]

[16] As the court of appeals noted (Pet. App. A27), petitioners did not contend that the Alamo Area Council of Governments was improperly certified by HUD or that it defaulted in its regional planning responsibilities. Petitioners appear to object only to

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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the fact that, in their opinion, the Council did not adequately discharge its responsibilities (*ibid.*). As the court of appeals found, there was no evidence to support such a charge (*ibid.*).

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